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Solicitor General

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 7.—ORIGINAL.

THE STATE OF SOUTH CAROLINA, COMPLAINANT,

VS.

THE STATE OF GEORGIA, ALPHONSO TAFT, SECRETARY OF WAR, UNITED STATES, A. A. HUMPHREYS, CHIEF OF ENGINEERS, UNITED STATES ARMY, AND Q. A. GILLMORE, LIEUTENANT-COLONEL ENGINEERS, UNITED STATES ARMY.

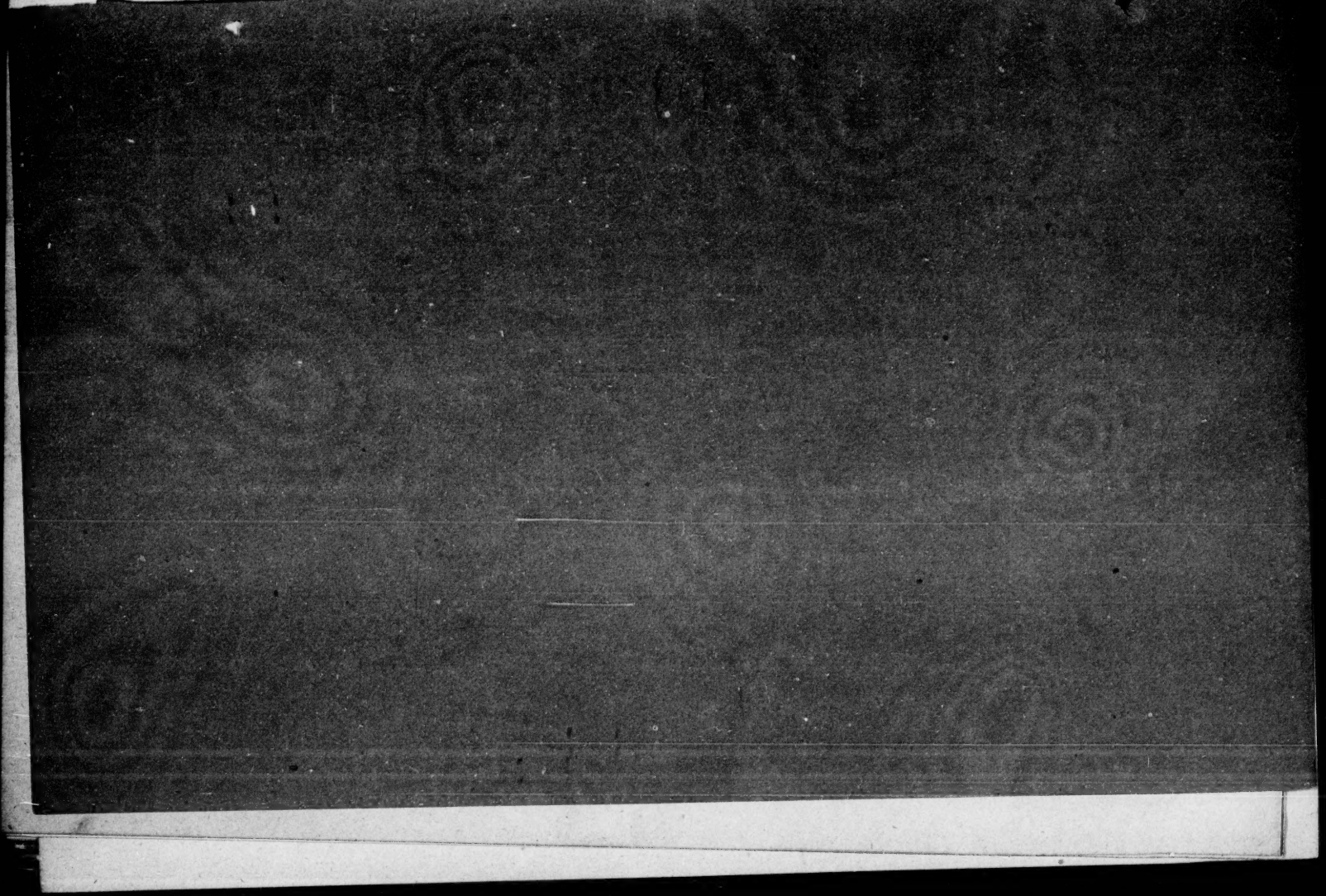
BILL IN EQUITY.

Sirmans Bill

Oct 14 1876

Demurrer Overruled

Ans Struck



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1 Supreme Court of the United States, October term, 1875.

On the 24th day of April, A. D. 1876, the following entry appears of record, to wit:

THE STATE OF SOUTH CAROLINA, COMPLAINANT,
vs.
THE STATE OF GEORGIA ET AL.

Mr. P. Phillips filed & submitted to the consideration of the court motion for leave to file bill and for restraining order in this cause. Leave granted to file bill.

2 THE UNITED STATES OF AMERICA:

In the Supreme Court.—In equity.

To the honorable the Chief-Justice and the associate justices of the Supreme Court of the United States, sitting in equity:

Daniel H. Chamberlain, governor of the State of South Carolina, for and in the name of the State of South Carolina, brings this bill of the said State of South Carolina against the State of Georgia; the honorable Alphonso Taft, Secretary of War of the United States; A. A. Humphreys, brigadier-general and Chief of Engineers of the United States Army, and Q. A. Gilmore, lieutenant-colonel of engineers of the United States Army.

And thereupon your orator, Daniel H. Chamberlain, governor as aforesaid, in the name of and for the State of South Carolina, humbly complaining, shews unto your honors:

1. That by the Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, done at Philadelphia on the 9th day of July, in the year of our Lord 1778, it was among other things provided that the United States, in Congress assembled, should be the last resort on appeal in all
3 disputes and differences then subsisting or that might thereafter arise between two or more States concerning boundaries, jurisdiction, or any other cause whatsoever, which authority should be exercised upon the petition of the legislature or executive authority or lawful agent of any State in controversy in the manner therein prescribed.

2. That a dispute and difference having arisen, and then subsisting, between the States of South Carolina and Georgia concerning their respective boundaries, the said States claiming respectively the same territories, the State of South Carolina on or about the day of , in the year of our Lord , presented a petition to the United States in Congress assembled; and did by the said petition pray for a hearing and determination of the difference and dispute subsisting as aforesaid between the said State and Georgia, agreeably to the Articles of Confederation and Perpetual Union between the United States of America. That thereupon the said State of Georgia, having been duly notified of the said petition, did by lawful agents appear, in order to establish the rights of the said State to the premises in manner directed by the said Articles of Confederation; and proceedings were thereupon had in Con-

gress in order to the appointment of judges to constitute a court for the hearing and determining the said matter in question.

3. That the dispute and difference between the said States of South Carolina and Georgia thus having been submitted to a hearing and determination of Congress and then pending before the same, the said States respectively desiring that all and singular the differences and claims subsisting between the said States relating to the boundary should be amicably adjusted and compromised, the legislature of the State of South Carolina elected Charles Cotesworth Pinckney, Andrew Pickens, and Pierce Butler, esquires, commissioners, and invested them, or a majority of them, with full and absolute power and authority in behalf of that State to settle and compromise all and singular the differences, controversies, disputes, and claims which subsisted between the said State and the State of Georgia relating to the boundary, and to establish and permanently fix a boundary between the two States.

4 And the said State of South Carolina did also declare that it would at all times thereafter ratify and confirm all and whatsoever the said commissioners or a majority of them should do in and touching the premises, and that the same should be forever binding on the State of South Carolina. That the legislature of the State of Georgia likewise appointed certain persons, to wit: John Houston, John Habersham, and Lachlan McIntosh, esquires, commissioners, and invested them with full and absolute power and authority in behalf of that State to settle and compromise all and singular the differences, controversies, disputes, and claims which subsisted between the said State and the State of South Carolina relative to the boundary, and to establish and firmly to fix a boundary between the two States; and the said State of Georgia did also declare that it would at all times thereafter ratify and confirm all and whatsoever the said last commissioners or a majority of them should do touching the premises, and that the same should be forever binding on the State of Georgia.

4. That thereupon, the said Charles Cotesworth Pinckney, Andrew Pickens, Pierce Butler, John Habersham, and Lachland McIntosh, esquires, commissioners on the part of the States of South Carolina and Georgia, by mutual consent assembled at the town of Beaufort, in the State of South Carolina, on the 24th day of April, 1787, and did then and there, among other things, mutually agree, for and in behalf of their respective States, to the following articles, that is to say:

"ARTICLE I. The most northern branch or stream of the river Savannah, from the sea or mouth of such stream to the fork or conference of the rivers, now called Tugoloo and Keowee, and from thence, the most northern branch or stream of the said river Tugoloo, till it intersects the northern boundary-line of South Carolina, if the said branch or stream extends so far north, reserving all the islands in the said rivers Tugoloo and Savannah to Georgia; but if the head spring or source of any branch or stream of the said river Tugoloo does not extend to the north boundary-line of South Carolina, then a west line to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugoloo River which extends to the highest northern lati-

5 tude, shall, forever hereafter, form the separation, limit, and boundary between the States of South Carolina and Georgia.

"ARTICLE II. The navigation of the river Savannah, at and from the bar and mouth, along the northeast side of Cockspur Island, and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah, to the upper end of the said island, and from thence up the bed or principal stream of

the said river to the confluence of the rivers Tugoloo and Keowee, and from the confluence up the channel of the most northern stream of Tugoloo River to its source, and back again by the same channel to the Atlantic Ocean, is hereby declared to be henceforth equally free to the citizens of both States, and exempt from all duties, tolls, hinderance, interruption, or molestation whatsoever attempted to be enforced by one State on the citizens of the other, and all the rest of the river Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia.

"ARTICLE III. The State of South Carolina shall not hereafter claim any lands to the eastward, southward, southwestward, or west of the boundary above established, but hereby relinquishes and cedes to the State of Georgia all the right, title, and claim which the said State of South Carolina hath to the government, sovereignty, and jurisdiction in and over the same, and also the right and pre-emption of the soil from the native Indians, and all other the estate, property, and claim which the State of South Carolina hath in or to the said lands.

"ARTICLE IV. The State of Georgia shall not hereafter claim any lands to the northward and northeastward of the boundary above established, but hereby relinquishes and cedes to the State of South Carolina all the right, title, and claim which the said State of Georgia hath to the government, sovereignty, and jurisdiction in and over the same, and also the right of pre-emption of the soil from the native Indians, and all other the estate, property, and claim which the State of Georgia hath in or to the said lands."

5. That the State of South Carolina, by act of the legislature
6 of the 29th February, 1788, ratified and confirmed the said convention and all the articles thereof, and declared the same forever binding on the State of South Carolina.

That the State of Georgia, by act of the 1st February, 1788, reciting the action of the said convention, enacted that whatever was done by the said commissioners, or a majority of them as aforesaid, was thereby ratified, and shall be considered as binding upon the citizens of that State, any law to the contrary notwithstanding.

6. And your orator further shews unto your honors, that from the date of the said convention to the day of February last, agreeably to its provisions, the navigation of the Savannah River up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the city of Savannah, to the upper end of the said island, and from thence up the bed or principal stream of the said river between Hutchinson's and Argyle Islands, has remained free and uninterrupted to the citizens of the State of South Carolina, and has continuously remained, from the time of said convention to the said day of February last, exempt from all duties, tolls, hinderance, interruption, or molestation whatsoever; and that during all that time the citizens of South Carolina have used and enjoyed the free navigation thereof without hinderance, molestation, or interruption of any kind whatsoever.

7. That on or about the day of last past, the said honorable Alphonso Taft, Secretary of War of the United States; A. A. Humphreys, brigadier-general and Chief of Engineers of the United States Army; and Q. A. Gilmore, lieutenant-colonel of Engineers of the United States Army, and their subordinates, employees, agents, servants, workmen, contractors, and men under their control and direction as officers of the Government of the United States, professing and claiming to be acting and directing the same under the orders of the

War Department of the General Government of the United States, but, as your orator believes and alleges, at the instance, request, and procurement of the State of Georgia, or of citizens thereof, commenced placing obstructions in the main channel of the said Savannah
7 River where the said channel runs between Hutchinson's and Argyle Islands, avowedly for the purpose of closing the said channel and diverting the main stream of the said river out of its usual and natural course and the course recognized and stipulated for, and so as greatly to interrupt the navigation thereof even at this present time, so as to prevent the use of it by the citizens of the State of South Carolina altogether and entirely, and thus to interrupt, obstruct, and interfere with the commerce between the States of South Carolina and Georgia; and that the said honorable Alphonso Taft, Secretary of War of the United States; A. A. Humphreys, brigadier-general and Chief of Engineers of the United States Army; and Q. A. Gilmore, lieutenant-colonel of Engineers of the United States Army, their subordinates, employees, agents, workmen, or contractors under them, are still proceeding to place obstructions in the said channel, and are driving piles therein so as ultimately to obstruct and completely to close the said channel, and altogether to prevent and hinder the citizens of the State of South Carolina from any use whatsoever of the said channel, the free navigation whereof was guaranteed to the said citizens of South Carolina by the convention and acts of the States of South Carolina and Georgia as aforesaid, to the great and irreparable injury and damage of all the citizens of South Carolina having occasion at any time to use and navigate the said river, and more especially to the great damage and injury of the said citizens of South Carolina owning lands upon the said river near to the said Hutchinson's and Argyle Islands, and the destruction of all their riparian rights attendant upon and attaching to said ownership.

8. That your orator has applied to the said defendants, by his agent and otherwise, to forbear and discontinue obstructing and interrupting the navigation of the said river and to remove the piles and other obstructions already placed therein as aforesaid to the damage of the citizens of the State of South Carolina. And your orator had well hoped that the said defendants would have complied with his said reasonable request, and would have foreborne to interrupt and obstruct the
8 navigation of the said river, and would have taken up and removed the said piles and obstructions already placed in the said river.

But now, so it is, may it please your honors, that the said defendants, combining and confederating together with divers other persons at present unknown to your orator, whose names, when discovered, your orator prays may be herein inserted, and they made parties defendants hereto, with proper and apt words to charge them, and contriving how to injure and oppress your orator, pretend that in placing the said piles and obstructions in the said river, and interrupting the navigation thereof, they are acting in pursuance of lawful authority, to wit, in pursuance of the authority of the Government of the United States; whereas your orator charges that no Department of the Government of the United States has any right or authority to direct or permit the defendants, claiming to act by its authority, to obstruct and interrupt the navigation of the said river, guaranteed as aforesaid to the citizens of the State of South Carolina, nor has any State government or person the right so to do, and thus to impair the obligation of the com-

pact between the State of Georgia and the State of South Carolina, as aforesaid.

All which actings, and doings, and pretences are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator and the citizens of the State of South Carolina in the premises. In tender consideration whereof, and forasmuch as your orator is remediless in the premises at and by the direct and strict rules of the common law, and cannot have adequate relief save in a court of equity, where matters of this and the like nature are properly cognizable and relievable:

To the end, therefore, that the said State of Georgia, the honorable Alphonso Taft, Secretary of War of the United States; A. A. Humphries, brigadier-general and Chief of Engineers of the United States Army; Q. A. Gilmore, lieutenant-colonel of Engineers of the United States Army, may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and be-
9 lief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereinunder written they are respectively required to answer; that is to say:

1. Whether the said defendants, or any of them, or their subordinates, employees, agents, servants, workmen, contractors, or men under their control and direction, as officers of the Government of the United States, have not driven piles and placed obstructions and barriers in the bed or principal stream of the Savannah River where the said main stream or channel runs between Hutchinson's and Argyle Islands at the point known as the Cross-Tides, with the intent and purpose of diverting the main stream of the said river from and out of its usual and natural course and of changing the natural bed thereof.

2. Whether the said defendants, or any of them, or their subordinates, employees, agents, servants, workmen, contractors, or men under their control and direction, are not still driving piles and placing obstructions and barriers in the said channel of the said river at the said point known as the Cross-Tides, and whether they, the said defendants, do not intend to continue to drive the said piles and to place the said obstruction in the said channel at the said point.

3. Whether the said piles, obstructions, and barriers already placed in the said channel at the said point in the said river, and those it is intended to place there, will not impede, interrupt, and obstruct the navigation in the said main channel where the same runs between the said Hutchinson's and Argyle Islands by the ordinary river craft, and by vessels of such burden as are now or have been used by the citizens of the State of South Carolina upon the said river in their commerce and intercourse with the city of Savannah.

4. Whether the said piles, obstructions, and barriers are not being placed in the said river at the said point at the instance, request, or procurement of the State of Georgia, or the citizens thereof? And, if not, at whose instance and by what authority.

10 5. Whether the said main channel has not been open and free of obstruction, hinderance, interruption, or molestation of any kind whatsoever, from the convention, agreement, or compact between the said States above mentioned to the time when the said defendants, or their subordinates or agents, commenced driving the said piles and placing the said obstructions and barriers in the said river.

And that the said defendants and their confederates when discovered, and all other persons, may be restrained and enjoined from further obstructing and interrupting the navigation of the said river in the manner hereinbefore mentioned or in any other manner.

May it please your honors to grant unto your orator as well your honors' writ of injunction as your honors' writ of subpœna, to be directed to the said the governor of the State of Georgia; the honorable Alphonso Taft, Secretary of War of the United States; A. A. Humphreys, brigadier-general and Chief of Engineers of the United States Army; Q. A. Gilmore, lieutenant-colonel of Engineers of the United States Army; their subordinates, employees, agents, servants, workmen, contractors, and men under their control and direction, thereby commanding them at a certain day, and under a certain penalty therein to be inserted, personally to be and appear before your honors in this honorable court, then and there to answer the premises, and to stand to and abide such order and decree therein as to your honors shall seem agreeable to equity and good conscience.

And your orator will ever pray, etc.

SAML. W. MELTON,
Attorney-General.

11 Personally appeared before me, Daniel Horlbeck, a commissioner of the United States court for South Carolina, Samuel W. Melton, attorney-general of the State of South Carolina, and made oath that the matters, facts, and things stated in the foregoing bill, as far as they are derived from his own knowledge, are correct and true; and, as far as they are derived from the knowledge of others, he believes them to be true.

(Signed) SAML. W. MELTON.

Sworn to before me the 21st day of April, 1876.

(Signed) DANL. HORLBECK,
Com'r U. S. C'ts for S. C.

12 THE UNITED STATES OF AMERICA:

In the Supreme Court. In equity.

THE STATE OF SOUTH CAROLINA
against
THE STATE OF GEORGIA, THE HON. ALONZO Taft, Secretary of War of the United States, and others.

Personally appeared before me, Daniel Horlbeck, a commissioner of the United States, Henry A. M. Smith, who, being duly sworn, deposes and says as follows: That the Savannah River, which flows between the State of South Carolina and the State of Georgia, and which, for almost its whole length, forms the boundary between the said States, is for many miles above the city of Savannah divided into different and separate streams or branches, which, after flowing in diverse courses, reunite together, or are connected and joined by various cuts and channels which flow from one of said branches to another, and that many and large islands are thus formed between the said streams or branches, and that the said Savannah River so continues to be divided into different and separate branches by islands, and again to reunite or to join together

at various intervals until the said river is emptied or discharged into the Atlantic Ocean.

That the main or principal channel of said river, beginning at the point where the said river is divided into different branches at
13 the upper or most northern end of Isla Island, thence continues between the said Isla Island and the main-land of the State of Georgia unto the lower or most southern end of the said Isla Island, where the said main channel of said river flows between the lower end of Isla Island and the most northeastern point of Onslow Island, and thence continues between the said Onslow Island, and the island known as Argyle Island, round the most southern end of the said Onslow Island and thence between the said Argyle Island and the main-land of the State of Georgia down to the upper or most northern end of Hutchinson's Island, and thence the said main channel-bed, or principal stream of the said Savannah River, flows between the lower or most southern end of Argyle Island and the upper or most northern end of Hutchinson's Island, at which point the said stream is commonly called the Cross-Tides, and continues into that branch of the Savannah River, commonly called Savannah Back River and thence down the channel or course of the said Savannah Back River between the said Hutchinson's Island and the main-land of the State of South Carolina to the lower or the most southern end of Hutchinson's Island, and thence by various channels to the Atlantic Ocean.

That that branch of the Savannah River which flows between the said Hutchinson's Island and the main-land of Georgia, and which flows in front of the city of Savannah, which said city is situate on the southern bank thereof, on the main-land of the State of Georgia, is commonly called Savannah Front River; and for further proof of all which, and that the same may more clearly appear as above described, this deponent refers to the map of the said Savannah River, hereto appended as an exhibit, marked "Exhibit A," which said map is the official chart published by the Coast Survey Department of the United States of America. That certain persons, with Q. A. Gilmore, a general in the Army of the United States, J. C. Post, a captain therein, and David Symons, a contractor, with others, have been for sometime, and still are engaged in driving piles and placing obstructions in the bed or principal stream of the said river Savannah, where the same flows between the said Argyle and Hutchinson Island, at the place known as the Cross-Tides
14 aforesaid, (designated on said map or chart by a red line,) with the intent to erect a barricade across said bed or principal stream extending from the upper or most northern end of Hutchinson's Island to the lower or most southern end of Argyle Island, and thereby to change the body of water now flowing down the bed or principal stream of said river from its ancient and accustomed channel into that branch of Savannah River which flows between the said Hutchinson Island and the main-land of the State of Georgia, known as Savannah Front River, the effect of which said barricade will be to close the said bed or principal stream of the said river and to obstruct and to put an end to, as this deponent believes, all the commerce, trade, and intercourse heretofore carried on by means of the navigation of the said bed or principal stream of said river at the said Cross-Tides, by the citizens of the State of South Carolina with the city of Savannah and elsewhere, and to prevent the free navigation of the said Savannah River by the said citizens of the State of South Carolina, up and down the bed or principal stream of said river in its accustomed and natural channel, as has been the wont and custom of the said citizens of the State of South Carolina; for although the said persons so obstructing and barricading the bed or

principal stream of the said river as aforesaid pretend to provide for the navigation of said stream by leaving an opening in said barricade, called a "flatway," for the passage of small boats and flats, yet such opening, even if the same were left, would be of no use, for it would be extremely dangerous, if not utterly impracticable, for any boat to attempt to go through such a narrow opening with such a swift and violent current rushing through said opening as even now passes down said bed or principal stream of the said river.

Sworn to before me this 21st April, 1876.

(Signed) HENRY A. M. SMITH.

(Signed) DANIEL HORLBECK,
Com. U. S. Courts for S. C.

15 *Motion for restraining order.*

Supreme Court of the United States.

STATE OF SOUTH CAROLINA
vs.
ALPHONSO TAFT ET AL.

On behalf of the State of South Carolina, complainant in above case, the court is now moved, that on the bill and affidavits filed by the complainant, that a restraining order or temporary injunction be directed to said Alfonso Taft, A. A. Humphries, Q. A. Gilmore, requiring them and all employees under them from further proceeding in placing any piles or obstructions in the Savannah River, upon the northern side of Hutching Island, at the place called the Cross-Tides, until the further order of this court.

And in case the court should refuse to grant the order prayed for without notice to the opposite party, that then the said parties named as above as defendants be required to appear in this court on the to show cause why a temporary injunction should not be granted.

P. PHILLIPS,
Sol. for Comp't.

Filed 24 April, 1876.

16 *Order of court.*

And on the 1st day of May, A. D. 1876, the following also appears of record, to wit:

THE STATE OF SOUTH CAROLINA, COMPLAINANT,
vs.
THE STATE OF GEORGIA ET AL.

On motion of Mr. P. Phillips leave is hereby granted him to file amended bill of complaint in this cause.

17 *Amendment of bill.*

Sup. C. U. S.

STATE OF SOUTH CAROLINA
vs.
STATE OF GEORGIA, ALPHONSO TAFT, A. A. Humphries, Q. A. Gilmore.

On this first day of May, 1876, and by leave of the court first had, the complainant amends his bill as follows:

In the first paragraph of the bill insert after the name of Alphonso Taft the words "citizen of the State of Ohio."

Insert after the name A. A. Humphries the words "citizen of the State of Pennsylvania."

Insert after the name Q. A. Gilmore the words "citizen of the State of Ohio."

P. PHILLIPS,
Of Counsel for Complainant.

(Endorsed :) 1875, October term, No. 8. Original. State of South Carolina vs. State of Georgia. Amendment of bill. Filed 1st May, 1876.

18 *Answer of Taft, Humphreys, & Gilmore.*

In the Supreme Court of the United States, in equity, October term, 1875.

DANIEL H. CHAMBERLAIN, GOVERNOR OF THE State of South Carolina, &c.,
vs.
THE STATE OF GEORGIA; THE HON. ALPHONSO Taft, Secretary of War of the United States; A. A. Humphreys, Brigadier-General and Chief of Engineers of the United States Army; and Q. A. Gilmore, lieutenant-colonel of engineers of the United States Army.

The joint and several answers of Alphonso Taft, Secretary of War of the United States; A. A. Humphreys, brigadier-general and Chief of Engineers of the United States Army; and Q. A. Gilmore, lieutenant-colonel of engineers of the United States Army, to the bill of complaint of Daniel H. Chamberlain, governor of the State of South Carolina, for and in the name of the said State of South Carolina.

These defendants, saving and reserving to themselves, &c., for answer to the said bill of complaint, or to so much thereof as they are
19 advised that it is necessary for them to answer, severally and respectively say:

1. That they have no reason to doubt the allegations in the first six paragraphs of said bill made, as regards the boundary between the said State of South Carolina and the State of Georgia, and, therefore, admit the same to be true.

2. They also admit that, for the purposes and under the legislation of the United States, as hereinafter set forth, but for no other purpose and under no other legislation or authority whatsoever, these defendants, acting in the discharge of the duties of their respective offices mentioned in said bill, to wit, the said Alphonso Taft, as Secretary of War; the said A. A. Humphreys, as Chief of Engineers of the United States Army; and the said Q. A. Gilmore, as lieutenant-colonel of Engineers of the United States Army, have, with the intention of improving the navigation of the Savannah River, commenced, and are now carrying forward, the construction of a temporary & experimental dam across its main stream between Hutchinson's and Argyle Islands, at a place known as Cross Tides, but they deny that this has been done at the in-
20 stance, request, or procurement of the State of Georgia, or of any citizens thereof, or that the navigation of that river, after such work shall have been completed, will not be as free to the citizens of South Carolina as heretofore.

3. These defendants, farther excepting to any right in the complain-

ant, the said State of South Carolina, to represent in this proceeding such private rights of citizens thereof as grow out of their being owners of land upon the said river, and having riparian rights in connexion therewith, deny that such interests will be affected by the work under construction as above, except so far as may be necessary for the improvement of navigation in the Savannah River, according to plans adopted by the War Department and repeatedly submitted to, and sanctioned by, the Congress of the United States.

4. Farther answering, these defendants say that, as regards commerce, the Savannah River is mainly interesting because of the city of Savannah, situated upon its southern bank, about fourteen miles above the bar at Tybee Roads. Where it flows past the city, the river is
21 divided into two channels by Hutchinson's Island, which extends above and below the city, with a length of about six miles, and a width, where widest, of one mile or more. Of these channels, the more northerly is known as Back River, whilst that which passes immediately by the city of Savannah is called Front River. Two-thirds (or16,000 cubic feet per second) of so much of the Savannah River as flows to the upper end of Hutchinson's Island passes through Cross-Tides (mentioned in the bill of complaint) into Back River, whilst only one-third (or 8,000 cubic feet per second) passes into Front River and by the city. In the meanwhile, the available depth of the two streams is much the same. Below the city, and towards the lower end of Hutchinson's Island, a small island, called Fig, formerly divided Front River, but at present the only existing channel is upon its south .

Previously to the revolutionary war, vessels trading to Savannah could rely upon a depth of 18 feet, at high water, over shoals. During that war, in order to prevent British ships from reaching Savan-
22 nah, vessels were sunk at a point just at the mouth of Front River, below Fig Island. In consequence of this, a shoal was created, now known as the Wrecks; and about 1828, where the depth in 1776 had at low water been twelve feet, it had been diminished to six feet.

The mean rise and fall of the tide at Tybee Roads is seven feet, at Savannah six and a half feet, and at Cross-Tides about five and a half feet.

The improvement of the approach by water to Savannah has been an object of national concern and legislation since 1828–'9, and the general result of the operations since then authorized by the United States has been to increase the depth at low water to about thirteen and a half feet. The present design of the officers of the United States in charge of the improvements of the harbor of Savannah is to give to that city the advantage of a depth of fifteen feet at low water, with the hope of increasing that hereafter to seventeen feet. A principal obstruction to the harbor is the above shoal at the Wrecks, which not only has con-
23 tinued to present great difficulties to dredging, but has also a tendency to fill up again by the deposit of silt which takes place constantly.

After great consideration of this matter, which had been committed to his immediate personal superintendence, the defendant, Q. A. Gilmore, in his annual report of August 28, 1873, to the defendant, A. A. Humphreys, as Chief of Engineers, &c., with a view of providing for an increase in the flow of water in Front River, and so enlarging its waterway, also its scouring effects at points lower down, recommended "that the Cross-Tides water-way be closed to the level of ordinary half or three-quarter tide, by the construction of a crib-dam across the stream at its narrowest point where it is only about 640 feet in width. The results

produced may indicate that a higher dam would be still more advantageous, in which case it should be raised to the level, perhaps, of ordinary high water, beyond which it would be injudicious to carry it. For the accommodation of the small boats and flats ordinarily using
24 this channel to reach the plantations on the South Carolina shore, the crib-work at mid-channel should be kept five to six feet below ordinary high-water level for a distance of fifty to sixty feet. This would afford ample channel-way for the small river-craft, such as canoes, row-boats, scows, and small sail-boats accustomed to pass and repass through the cross-tides. Vessels of a larger draught than four or five feet, rarely have occasion to use the upper portions of Back River at all, and when required to do so, can enter at the 'Wrecks.'"

This report having been duly approved by the defendant, A. A. Humphreys, as Chief of Engineers, and by the then Secretary of War, and also by the President of the United States, was communicated to Congress at its next session, and thereupon an appropriation of fifty thousand dollars was made by that body to carry into effect that and other recommendations in the said report for the improvement of the harbor of Savannah. (18 Stat., 240.)

In a like report by the defendant, Q. A. Gilmore, upon the 28th
25 of August, 1874, the same recommendation was substantially repeated, and after a second approval by the Chief of Engineers, the Secretary of War and the President, was also communicated to Congress, and sanctioned by a like appropriation of seventy thousand dollars. (Act of March 3, 1875, 18 Stat., 459.)

The dam now being constructid at the Cross-Tides is in accordance with the above official recommendations. It is temporary and experimental in character, and if successful is to be replaced by a permanent structure at some future day. In neither its temporary nor its permanent form, as at present designed, is it intended to close the Cross-Tides, but only to divert so much of the water now passing that way as may be necessary to accomplish the end above described. How much of that water may be required must be left for future determination. But according to the present scheme of operation a channel is to be made through the temporary and also the permanent dam of sufficient capacity to admit the passage of all water-crafts that, so far as these defendants are informed, pass through the Cross-Tides. These defendants be-
26 lieve that the said dam will neither increase the height of the floods in Back River, nor injuriously diminish the rise of the tides therein, nor injuriously affect cultivation on either of its banks.

5. In specific reply to the interrogatories in the said bill of complaint contained, these defendants answer the first two affirmatively as qualified by the statement made above; and also, as so qualified, they answer the third interrogatory in the negative. The fourth interrogatory has already been specifically answered. To the fifth interrogatory they answer that, so far as they are informed, the said main channel has always heretofore been substantially open and free from other obstruction to navigation than such as has arisen from the natural shallowness of the stream. These defendants, having fully answered, pray to be hence dismissed with their reasonable costs, &c.

A. A. HUMPHREYS,
Brig. Genl., Chief of Engrs.

A. A. Humphreys, one of the defendants named in the above answer, having been duly sworn before me, deposes says that
27 the statements contained therein have been made known to

him mainly by the reports of his subordinate officers, and by the histories and public documents of the United States; that he believes such statements to be true; and that all other statements therein not contained in such reports and public documents are true to his own knowledge.

Sworn to & subscribed before me this 1st day of May, 1876.

D. W. MIDDLETON.
Clerk Sup. Ct. U. S.

(Indorsed:) Sup. Court U. S. 1875; Octo. term. No. 7. Original. State South Carolina, comp't, vs. State of Georgia. Answer of Taft, Humphreys, & Gilmore. Filed 1st May, 1876.

23 *Notice of motion for preliminary injunction.*

Supreme Court of the United States.

THE STATE OF SOUTH CAROLINA
vs.
THE STATE OF GEORGIA & AL. } Original. No. 7.

To the Honorable Alphonso Taft, Secretary War, U. S. A., General A. A. Humphreys, Engineer Department, U. S. A., and General Q. A. Gilmore, Engineer Department, U. S. A.:

SIRS: By the direction of the Supreme Court U. S. we have to give you notice that on Monday next, the 1st May, we shall, in behalf of the State of South Carolina, move for a preliminary injunction in this case to restrain the further prosecution of the work at the Cross-Tides, Savannah River, now in progress under the direction of the Engineer Department. Copies of the bill and affidavits are hereunto annexed by direction of the court.

We have the honor to be,

P. PHILLIPS,
EDWARD McCRADY, JR,
Of Counsel for the State of So. C.

29 I acknowledge service of the within notice April 25, 1876.

ALPHONSO TAFT,
Sec'y of War.

I acknowledge to have received notice of the within.

A. A. HUMPHREYS,
Brig. Genl., &c., &c.

APRIL 25, '76.

Filed 8 May, 1876.

30 *Notice of motion for injunction.*

Before Judge Bradley at chambers.

Supreme Court U. States.

THE STATE OF SOUTH CAROLINA
v.
THE STATE OF GEORGIA & AL. } No. 7. Original.

To the honorable Alphonso Taft, Secretary of War, U. S. A., General A. A. Humphreys, Engineer Department, U. S. A., and General Q. A. Gilmore, Engineer Department, U. S. A.:

SIRS: By the direction of the Supreme Court U. S. we have to give you notice that on Thursday next, the fourth of May, before Mr. Justice

Bradley, we shall, in behalf of the State of South Carolina, move for a preliminary injunction in this case to restrain the further prosecution of the work at the Cross-Tides, Savannah River, now in progess under the directions of the Engineer Department.

Copies of the bill and affidavits are hereunto annexed by direction of the court.

We have the honor to be,

P. PHILLIPS,
WM. HENRY WESCOTT,
Of Counsel for the State of South Carolina.

MAY 1, 1876.

31 Service accepted.
May 2d, 1876.

S. F. PHILLPS,
Act'g Att'y Gen'l.

Filed 8 May, 1876.

32 *Preliminary injunction.*

STATE OF SOUTH CAROLINA
v.
TAFT, HUMPHRIES, GILMORE, AND STATE of Georgia.

Having considered the bill and amendment, together with the affidavits filed therewith, as also the answer filed by said Taft, Humphries, & Gilmore, and the argument of counsel for and against the motions for a temporary injunction, it is now ordered, adjudged, and decreed that the said named defendants, and all employees under them, be enjoined and restrained from further prosecuting the work between Hutchinson's and Argyle Islands in the Savannah River, complained of in the bill filed in this case, this order being granted upon terms. That the cause be brought on for final hearing with all convenient speed, and subject to the right of the defendants to move for a dissolution of the injunction or failure thus to bring said cause to hearing.

Let a copy of this order be served on the defendants.

Dated May 8th, 1876.

JOSEPH P. BRADLEY,
Associate Justice of the Supreme Court of the U. S.

33 I, John G. Nicolay, marshal of the Supreme Court of the United States, hereby certify that on the 12th day of May, A. D. 1876, I served the within writ on the within-named A. A. Humphries by reading the same to him and giving him a certified copy thereof; also that on the 13th day of May, A. D. 1876, I served the within writ on the within-named Alphonso Taft, by reading the same to him and giving him a certified copy thereof.

JOHN G. NICOLAY,
Marshal.

Service of a copy of the within order acknowledged this 12th day of May, 1876, at 4h. 30m. p. m.

A. A. HUMPHRIES,
Brig. Genl., Chief of Engineers, U. S. A.

Service of a copy of the within order acknowledged this 13th day of May, 1876.

ALPHONSO TAFT,
Secretary of War.

(Indorsed:) Supreme Court U. S., 1875. Octo. term. Original No. 8. The State of South Carolina, compt., The State of Georgia et al. Restraining order by Judge Bradley at chambers. Filed 8 May, 1876.

34 *Order of court.*

And on the 8th day of May, A. D. 1876, the following appears of record, to wit:

THE STATE OF SOUTH CAROLINA, complainant, *vs.* THE STATE OF GEORGIA ET AL. } 8 orig'l.

The bill of complaint and amendment thereto having been answered by said defendants, Taft, Humphries, and Gilmore, it is now ordered that the remaining defendant, the State of Georgia, answer the same within sixty days from the service of subpœna, and a copy of the bill and amendment on the governor & attorney-general of said State.

If the said State shall not appear at the return-day named in the subpœna, the complainant shall be at liberty to proceed ex parte.

It is further ordered that replication to answer in this case be filed within ten days after the filing of the answer of the State of Georgia.

35 *Order of court.*

And on the day and year last aforesaid, the following also appears of record, to wit:

THE STATE OF SOUTH CAROLINA, complainant, *vs.* THE STATE OF GEORGIA ET AL. } 8 orig.

For the purpose of speeding the trial of the above cause, it is ordered that the clerk of this court, sixty days after the service of a subpœna on the governor & attorney-general of the State of Georgia, or as soon as the State of Georgia shall file its answer, shall issue a commission to James E. Hagood, clerk of the circuit court of the United States at Charleston, South Carolina, to examine such witnesses as may be brought before him by either the complainant or defendants, touching the character of the obstruction now being placed at the Cross-Tides between Hutchinson's Island and Argyle Island, in the Savannah River,
36 and its effect upon the navigation of the Savannah River, and the property owned on said river.

The time and place for the examination of witnesses to be notified to the adverse parties ten days before the examination. The testimony to be closed by the second Monday of September next.

It is further ordered that the cause be set down for hearing on the first day of next term of the court, and on failure of its being brought on hearing at that time, the defendant shall be at liberty to apply for a dissolution of the injunction.

37 *Subpœna.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the State of Georgia greeting:

For certain causes offered before the Supreme Court of the United States, having jurisdiction in equity, you are hereby commanded that, laying all other matters aside and notwithstanding any excuse, you be and appear before the said Supreme Court, holding jurisdiction in equity,

on the second Monday of October next, at the city of Washington, in the District of Columbia, being the seat of the National Government of the United States, to answer unto the bill of complaint of the State of South Carolina, in the said court exhibited against you.

Hereof you are not to fail at your peril.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, at the city of Washington, the eight day of May, A. D. 1876.

D. W. MIDDLETON,
Clerk Supreme Court U. S.

38

SUPREME COURT U. S.,
Marshal's Office, May 16, 1876.

I, John G. Nicolay, marshal of the Supreme Court of the United States, do hereby authorize and deputize William H. Smyth, United States marshal, to serve the foregoing writ and to make due return thereof.

JNO. G. NICOLAY,
Marshal.

OFFICE U. S. MARSHAL, DISTRICT OF GA.,
Atlanta, Ga., May 26, 1876.

I certify that I have, this twenty-fourth day of May, A. D. 1876, served the foregoing writ, at Atlanta, Ga., by reading the same to James M. Smith, governor of the State of Georgia, and showing him the seal thereof, and by delivering to him a certified copy of the same with its accompanying papers; and I do further certify that I have also, this twenty fifth day of May, A. D. 1876, served the said writ by reading the same to N. J. Hammond, attorney-general of the said State of Georgia, and showing him the seal thereof, and by delivering to him a certfied

39 copy of the same with its accompanying papers.

JNO. G. NICOLAY,
Marshal,
By WM. H. SMYTH,
U. S. Marshal and Deputy, as aforesaid.

(Indorsed:) Sup. Court U. S. 1876. Octo. term. Original No. 7. The State of South Carolina, comp't., vs. The State of Georgia. Subpœna and service filed 29 May, 1876.

40 *Answer of Georgia.*

In the Supreme Court of the United States. In equity. October term, 1875.

DANIEL H. CHAMBERLAIN, GOVERNOR OF THE State of South Carolina, &c.,
vs.
THE STATE OF GEORGIA, THE HON. ALPHONZO TAFT, Secretary of War of the United States, A. A. Humphreys, Brigadier-General and Chief of Engineers of the United States Army, & Q. A. Gilmore, lieutenant-colonel of engineers of the United States Army.

The separate answer of the State of Georgia to the bill of complaint above described.

This defendant, making the usual reservations to itself, for answer to said bill of complaint, or to so much thereof as it is advised that it is necessary for it to answer, says:

1st. For the purposes of this cause, the allegations in the first six paragraphs of the said bill are admitted, so far as they concern the boundary between the States of Georgia and South Carolina and the rights of the citizens of said States respectively to the navigation of said Savannah River as between themselves as citizens of said States.

41 2nd. This defendant denies that the said Alphonzo Taft, Secretary of War of the United States, A. A. Humphries, Brigadier-General and Chief of Engineers of the United States Army, and Q. A. Gilmore, lieutenant-colonel of the engineers of the United States Army, and their subordinates, &c., or either of them, in the beginning or carrying on of the obstructions in and to said river, in said bill complained of, were, or are, acting at the instance or request or procurement of the State of Georgia. This defendant, as a State, has no control over said other defendants or their subordinates, nor authority to direct them or any of them in said premises, nor has she attempted to exercise such control or direction. This defendant is interested in the improvement of the Savannah River, and, so far as the same can be done without injury to others, heartily approves the same; but, as a State, has nothing to do with the improvement thereof being carried on by said other defendants; and they are acting solely for, and at the instance of, the United States, which has the right to improve said river. How

42 far said action of said other defendants to said bill may meet with the approval of citizens of Georgia, this defendant is not advised. They are also citizens of the United States, and as such are interested in the improvement of said river. But this defendant denies that said other defendants, in what they have been or are doing, touching the matters complained of in said bill, are, or were, acting at the instance or request or procurement of citizens of Georgia, as such, but solely at the instance, request, & procurement of the United States.

This defendant admits that for the purposes & under the legislation of the United States, as hereinafter set forth, but for no other purpose & under no other legislation or authority whatsoever, said other defendants to said bill of complaint, acting in the discharge of the duties of their respective offices mentioned in said bill, to wit, the said Alphonzo Taft, as Secretary of War; the said A. A. Humphreys, as Chief of Engineers of the United States Army, & the said Q. A. Gilmore, as lieutenant-colonel of engineers of the United States Army, have, with the intention of improving the navigation of the Savannah River,

43 commenced and, until restrained, were carrying forward the construction of a temporary & experimental dam across its main stream, between Hutchinson's and Argyle Islands, at a place known as Cross-Tides; but it denies that the navigation of that river, after such work shall have been completed, will not be as free to the citizens of South Carolina as heretofore.

3. This defendant, further excepting to any right in the complainant, the said State of South Carolina, to represent in this proceeding such private rights of citizens thereof as grow out of their being owners of lands upon the said river, & having riparian rights in connexion therewith, denies that such interests will be affected by the works under construction as above, except so far as may be necessary for the improvement of navigation in the Savannah River according to plans adopted by the War Department & repeatedly submitted to and sanctioned by the Congress of the United States.

4. Further answering, this defendant says that, as respects commerce, the Savannah River is mainly interesting because of the city of

44 Savannah, situated upon its southern bank. About fourteen

miles above the bar at Tybee Roads, where it flows past the city, the river is divided into two channels by Hutchinson's Island, which extends above & below the city with a length of about six miles, & a width, where widest, of one mile or more. Of these channels the more northerly is known as Back River, whilst that which passes immediately by the city of Savannah is called Front River. Two-thirds (or 16,000 cubic feet per second) of so much of the Savannah River as flows to the upper end of Hutchinson's Island passes through Cross-Tides (mentioned in the bill of complaint) into Back River, whilst only one-third (or 8,000 cubic feet per second) passes into Front River & by the city. In the meanwhile the available depth of the two streams is much the same. Below the city & towards the lower end of Hutchinson's Island, a small island, called Fig, formerly divided Front River, but at present the only existing channel is upon its south. Previously to the Revolutionary war, vessels trading to Savannah could rely upon a
45 depth of 18 feet at high water over shoals. During that war, in order to prevent British ships from reaching Savannah, vessels were sunk at a point just at the mouth of Front River, below Fig Island. In consequence of this a shoal was created, now known as the Wrecks, and about 1828, where the depth in 1776 had, at low water, been twelve feet, it had been diminished to six feet. The mean rise and fall of the tide at Tybee Roads is seven feet, at Savannah six & a half feet, and at Cross-Tides about five & a half feet.

The improvement of the approach by water to Savannah has been an object of national concern and legislation since 1828–'9, and the general result of the appropriations since then authorized by the United States has been to increase the depth at low water to about thirteen and a half feet.

The present design of the officers of the United States, defendants to this bill, in charge of the improvements of the harbor of Savannah, is to give to that city the advantage of a depth of fifteen feet at low water, with the hope of increasing that hereafter to seventeen feet.

46 A principal obstruction to the harbor is the above shoal at the wrecks, which not only has continued to present great difficulties to dredging, but has also a tendency to fill up again by the deposit of silt, which takes place constantly.

After great consideration of this matter, which had been committed to his immediate personal superintendence, the defendant, Q. A. Gilmore, in his annual report of August 28, 1873, to the defendant, A. A. Humphreys, as Chief of Engineers, &c., with a view of providing for an increase in the flow of water in Front River, & so of enlarging its water-way, & also its scouring effects at points lower down, recommended:

"That the Cross-Tides water-way be closed to the level of ordinary half or three-quarter tide by the construction of a crib-dam across the stream at its narrowest point, where it is only about 640 feet in width. The results produced may indicate that a high dam would be still more advantageous; in which case it should be raised to the level perhaps of ornimary high water, beyond which it would be injurious to carry it.

For the accommodation of the small boats & flats ordinarily
47 using this channel, to reach the plantations on the South Carolina shore, the crib-work at mid-channel should be kept five to six feet below ordinary high-water level for a distance of fifty or sixty feet. This would afford ample channel-way for the small river-craft, such as canoes, row-boats, scows, and small sail-boats, accustomed to pass & repass through the Cross-Tides. Vessels of a larger draught than four

or five feet rarely have occasion to use the upper portions of Back River at all, & when required to do so can enter at the Wrecks."

This report having been duly approved by the defendant, A. A. Humphreys, as Chief of Engineers, & by the Secretary of War, & also by the President of the United States, was communicated to Congress at its next session, & thereupon an appropriation of fifty thousand dollars was made by that body to carry into effect that and other recommendations in the said report for the improvement of the harbor of Savannah. (18 Stat., 240.) In like report by the defendant, Q. A. Gilmore, upon the
28 of August, 1874, the same recommendation was substantially
48 repeated, & after a second approval by the Chief of Engineers, the Secretary of War, & the President, was also communicated to Congress, and sanctioned by a like appropriation of seventy thousand dollars. (Act of March 3, 1875, 18 Stat. 459.)

The dam now being constructed at the Cross-Tides is in accordance with the above official recommendation. It is temporary and experimental in character, &, if successful, is to be replaced by a permanent structure at some future day. In neither its temporary nor its permanent form, as at present designed, is it intended to close the Cross-Tides, but only to divert so much of the water now passing that way as may be necessary to accomplish the end above described. How much of that water may be required must be left to future determination. But, according to the present scheme of operation, a channel is to be made through the temporary & also the permanent dam, of sufficient capacity to admit the passage of all water-craft that, so far as this defendant is informed, pass through the Cross-Tides.

49 This defendant believes that the said dam will neither increase the height of the floods in Back River nor injuriously diminish the rise of the tides therein, nor injuriously affect cultivation on either of its banks.

In answer to the interrogatories to said bill, this defendant answers as follows:

To the first. This defendant believes it is true, as qualified above.

To the second. This defendant believes it is true that they were so doing, as qualified above, when the bill was filed, but supposes they desisted after the order of court in this cause.

To the third. This defendant has no knowledge, information, or belief on this subject, except that gained from the answers of the other defendants, & this defendant believes from said answers that this is not true, except as above stated.

To the fourth. Not at the instance, request, or procurement of the State of Georgia or its citizens, but at the instance and under the orders of the proper officers of the United States, viz, the other defend-
50 ants to this bill, under the direction of the Congress of the United States, as this defendant is advised & believes.

To the fifth. It has, to the best of this defendant's information, knowledge, & belief, except as to the natural shallowness of the stream.

And having fully answered, this defendant prays to be hence discharged, with its reasonable costs, &c.

N. J. HAMMOND,
Atty. Genl., Sol. for the State of Georgia.

UNITED STATES OF AMERICA,
Northern District of Georgia:

James M. Smith personally came before me, the undersigned officer of the United States, and being duly sworn, deposes and says that he is

governor of said State of Georgia; that the statements in the foregoing answer have been duly made known to him mainly by the answer of Alphonzo Taft, Secretary of War of the United States; A. A. Humphreys, brigadier-general & Chief of Engineers of the United States; and Q. A. Gilmore, lieutenant-colonel of engineers of the United
51 States Army, to said bill of complaint; that he believes such answer to be true, both as to the acts of said defendants and the authority for such acts by them stated, and all other statements therein not taken from said answer are true of his own knowledge.

JAMES M. SMITH.

Sworn to and subscribed before me this the tenth day of July, 1876, as witness my signature and seal.

[SEAL.]

A. E. BUCK,
U. S. C. C. Comr., N. D. of Ga.

(Endorsed:) Sup. Ct. U. S., October term, 1876. No. 7. Original. State of South Carolina, compt., vs. State of Georgia & al. Answer of the State of Georgia. Filed in office July 13th, 1876. D. W. M., Clerk Sup. Ct. U. S.

52 *Replication.*

In the Supreme Court of the United States.

THE STATE OF CAROLINA
against
THE STATE OF GEORGIA, A. TAFT, SECRETARY of War, Humphries, U. S. A., and others. } Injunction.

The replication of The State of South Carolina, complainant, to the answer of The State of Georgia, and all and each of the defendants in the above cause.

The repliant, saving and reserving now and at all times hereafter all and all manner of benefit and advantage of exception which may be taken to the mainfold insufficiencies of the said answers, for replication thereto says that he will ever maintain and prove thé bill of complainant to be true, certain, and sufficient in the law to be answered, and that the said answer is uncertain, untrue, and insufficient to be replied unto by this repliant, without this; that any other matter or thing whatever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently re-
53 plied to, confessed or averred, traversed or denied, is true; all which matters and things this repliant is and will be ready to ever, maintain, and prove as this honorable court shall direct; and humbly prays as we and by the said bill has been always prayed.

P. PHILLIPS,
WM. HENRY TRESCOT,
Solr., Complainant.

(Indorsed:) Sup. Court U. S., 1876, Oct. term. Original, No. 7. The State of South Carolina, compt., vs. The State of Georgia et al. Replication. Filed July 19, 1876.

IN THE

SUPREME COURT

OF THE UNITED STATES.

STATE OF SOUTH CAROLINA
against
STATE OF GEORGIA,
ALPHONZO TAFT, Sect. War.,
A. A. HUMPHREYS, Brig. Gen.
and Chief of Eng., U. S. A.,
Q. A. GILMORE, Col. Eng. U. S. A.

BRIEF OF P. PHILLIPS,

SOLICITOR FOR COMPLAINANT.

WASHINGTON:
R. O. POLKINHORN, PRINTER.
1876.

In the Supreme Court, of U. S.

STATE OF SOUTH CAROLINA
vs.
TAFT, HUMPHREYS, GILMORE
AND THE STATE OF GEORGIA.

Brief of P. PHILLIPS,

FOR COMPLAINANT.

On 28 April, 1787, Commissioners, duly appointed by the States of South Carolina and Georgia, met at Beaufort, in the first named State, and entered into a compact by which South Carolina ceded to Georgia all the Islands in the Tugoloo and northern branch of the Savannah River.

It was further stipulated that these water courses should be "free to the citizens of both States, and exempt from all duties, tolls, hinderance, interruption, or molestation whatsoever attempted to be enforced by one State on the citizens of the other, and all the rest of the river Savannah to the southward of the forgoing description is acknowledged to be the exclusive right of the State of Georgia."

A full history of this, together with the action of the Executive Department in its relation thereto, will be furnished by my colleague, Mr. Trescot.

This compact was ratified by Georgia on 1 February, 1788, and by South Carolina on 29 February of same year.

The Constitution of the United States became operative on the first Wednesday in March, 1789.

Owings *vs.* Speed, 5 Wheat., 420.

The compact thus entered into prior to the adoption of the Constitution is a valid and binding obligation between parties competent to contract.

When the Revolution took place each State became sovereign, and in that character held the absolute right to all their navigable waters.

This is subject only to whatever rights they may have since surrendered by the Constitution to the general government.

Martin *vs.* Waddell, 16 Pet., 639.

The bill is filed for the protection of this right to unmolested navigation. The answers of defendants admit that the work complained of obstructs the navigation, but maintain that they are protected by certain acts of Congress passed in pursuance of that clause of the Constitution which authorizes Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The acts of Congress referred to are certain general Appropriation Bills for River and Harbor improvement, and the clauses relied on are as follows.

"For the improvement of Savannah Harbor and River, $50,000."

17 Stats., 373.

"For continuing the improvement of the Harbor of Savannah, $50,000."

18 Stats., 240.

"For the improvement of the Harbor at Savannah, $70,000."

18 Stats., 459.

The rights and obligations arising from this compact between the two States remained wholly unaffected by the adoption of the Constitution. The stipulations of each to the other are in morals and law as obligatory now as when they were entered into.

Such compacts have been frequently presented to the consideration of the court, and have uniformly been upheld and rigorously enforced. See Green *vs.* Biddle, and other cases.

How far they may be interferred with by Congress, under the grant of the commercial power, has never been determined.

Under this power an act of Congress authorizing the erection of a bridge over a navigable river was sustained in the Wheeling Bridge case. This authority was coupled with, the condition that it should be so constructed *as not to interfere with navigation.*

Referring to this decision, this Court said, in 1865, "Since the adoption of the Constitution there has been but one instance of such legislative interposition, that was to save and not to destroy."

We deny, that under the power to regulate commerce "among the several States," Congress can destroy the navigation of one State to improve the navigation of another.

Such an act would not only be against the principles of justice but in conflict with the spirit of the Constitution, which, in all its provisions, secures equal rights to citizens and States.

"All duties, imposts and excises shall be uniform throughout the United States."

"No capitation or direct tax shall be laid unless in proportion to the census or remuneration."

"No preference shall be given by any regulation of

Angell On Tide Waters p 86.

commerce or revenue to the ports of one State over those of another."

Let us, however, admit, for the argument, that Congress has the power to override this compact and construct this work, we then reach the enquiry has this power been exercised?

Rule of Interpretation.

It is to be observed that the acts relied on as a justification do not specify the means by which the improvement of the Harbor of Savannah is to be accomplished. Their language is general.

The fundamental rule in the interpretation of a statute is to seek for the intent of the legislature.

It is said that these appropriations of money are to be construed with reference to certain reports made by the engineers to the War Department, and by that Department to Congress.

We insist that this would be a most dangerous rule, and would in most cases interpolate matters of which the members of the legislature were entirely ignorant.

The words of the statute itself furnish the only proper means for arriving at the intent.

In Alridge vs. Williams there was a strenous attempt made to induce the court, in construing the statute then presented, to look to the reports, amendments and debates connected with the passage of the bill. But the court said: "In expounding the law the judgment of the court cannot in any degree be influenced by the construction placed upon it by individual members of Congress in debate, nor by the motives or reasons assigned by them for supporting the amendments that were offered. The law as it passed is the will of

the majority of both Houses; and the only mode in which that will is spoken is in the act itself, and we must gather their intent from the language there used."

3 How., 24.

So in Savings Bank vs. U. S., where the internal revenue act was under consideration. The Commissioners who were required to prescribe the returns, and who therefore were called on to construe the law, had adopted a certain construction. This was first done by Rollins, and his construction was followed by his successors, Delano and Pleasonton. After this practical construction had been made and acted on for four years, Congress in a new act imposed the tax in the same words as the old.

This presented a very strong case for the argument that the new act should be construed in connection with the decisions of the officials who had administered the old law. But the court rejected the proposition. It held that the act was to be construed by its own terms, and that it was not to be presumed that these decisions of the Commissioners were brought to the knowledge of Congress when the act was passed. 19 Wall., 237.

Another rule is this, that a statute will never be so construed as to work great inconvenience or injustice, or interfere with vested rights, without the plain words of the statute demand imperatively such a construction

Fisher, v. U. S., 2 Cranch., 385.

In United States v. Kirby, the rule is stated thus: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always therefore be presumed, that the legislature intended exceptions to its language which

would avoid results of this character. The reason of the law in such cases should prevail over its letter."

7 Wall., 486.

In the leading case of Dash, v. Vankleek, an attempt was made to give to the general words of the statute as to escapes a retroactive effect. But after an elaborate review of the principles of interpretation, by Kent, Chancellor, he denounced it and declared the rule to be, that a statute is never to be so construed, "as to work a destruction of rights, previously attached."

7 John., 502.

We may further cite the case of Cohen v. Virginia. Congress had granted to the corporation of Washington the power to raise money by a lottery. Under this grant, a lottery was organized, and Cohen acting under full powers, sold a ticket in the city of Norfolk; there existing in the State of Virginia a law, forbiding the sale of such ticket, except in lotteries *authorized by the State.*

It was not denied that the lottery was fully authorized, nor that the *general words* of the grant covered the sale by Cohen—on the other hand, the right of the State to pass the prohibitory act, was equally apparent.

Under these circumstances the court held that the grant by Congress to the Corporation ought not to be construed so as to violate this right of the State, "unless its provisions were such as to render the construction inevitable," and so the judgment against Cohen was affirmed. 6 Wheat., 264.

The case of Commonwealth, v. Downes, decided by Shaw, C. J., is very analogous to the one before us.

Congress passed an act for the enlistment of boys in the Naval service. Lord, a minor, was duly enrolled under it. The guardian of Lord had never consented to the enlistment, and the question whether he should be

discharged, arose on a writ of Habeas Corpus directed to the officer in command of the Naval Station.

The power of Congress to enlist boys was fully admitted, as was also the authority to provide the means for carrying the power into effect. The Court after adverting to the right of parents and guardians to the custody of minors, say: It is not necessary to decide that Congress has not the power to enlist boys without their consent; but the argument is this—that whenever Congress shall perceive an exigency so great as to warrant extraordinary means for recruiting the navy they will do it in terms admitting of no doubt, and under such regulations as will prevent it from becoming oppressive or injurious.

In conclusion they say: "We are therefore of opinion that the law simply authorizing the employment of boys did not intend to supersede the authority of parents and guardians, but was intended to be carried into effect in subordination to the established rights of those interested with the custody of minors." 24 Pick., 230.

In the case before us we have a dry appropriation of money for a given improvement; the means to effect it are not designated in the law; the defendants select means which violate the compact between the States, and defend themselves with the assertion that the true construction of the law is that Congress intended this violation.

This statement would seem to involve a *reductio ad absurdum*, and this the court will avoid by holding the principle enunciated in the case last cited that the act of appropriation is to be carried into effect "*in subordination to the established rights of*" South Carolina under the compact.

We have thus fully discussed the rule of interpretation, for if we are right in our statement of it, the controversy is ended without at all challenging the constitutional power of Congress.

Jurisdiction.

The parties to the compact are the two States; and if the right of either has been invaded the wronged State is the proper party to seek redress in a Court of Justice.

In the "city of Georgetown vs. The Canal Company, the bill was filed by the corporation of Georgetown complaining of the construction of the Aqueduct across the Potomac as a violation of the compact for free navigation stipulated for by the States of Virginia and Maryland in 1785."

The bill was dismissed on the ground that the compact "was made between the two States *in their character as States;* that their citizens as such individually were in no just sense parties to it; those parties were the two States; that the States may at any time have modified their compact; that after their cession to the United States Congress could do what the States could have done, subject only to the limitations imposed by the acts of cession." 12 Pet., 91.

The State being then the proper party to seek the redress, is the Federal Court the proper tribunal to enforce it?

By the 2d sec., 3d art., the judicial power, *inter alia*, is declared to extend "to all cases in law or Equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority."

In addition to this—"to controversies between two or more States—to controversies between a State and citizens of another State."

It then provides, that as to those controversies "in which a State shall be a party, the Supreme Court shall have original jurisdiction," and as to all the other cases, appellate jurisdiction.

And so the organizing act of 1789, in its 13th sec., provides (R. S., § 687,) that "the Supreme Court shall have exclusive jurisdiction of *all controversies* of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens—in which latter cases *it shall have original* but not exclusive jurisdiction."

We have thus presented, by the Constitution, two classes of cases for the exercise of the judicial power vested in Federal tribunals.

The first of these depends on the *character of the cause*, and embraces "all cases in law or Equity arising under the Constitution, &c." Here the jurisdiction is exercised without any reference to the condition or character of the parties.

In the second class, the jurisdiction depends entirely on the *character of the parties.* In this is comprehended "controversies between two or more States, between a State and citizens of another State, and between a State and foreign States, citizens or subjects."

As to this class, it is wholly unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

One of the express objects for which the Judicial Department was established is the decision of controversies between States, and between a State and individuals. Therefore the mere circumstance that the State is a party gives jurisdiction to the court.

Cohens v. Virginia, (6 Wheat., 264.)

These principles are set forth in the "Federalist," in which it is argued that "the National Judiciary ought to preside in all cases where one State is opposed to another State or its citizens." No. 80.

There is, however, this limitation: to sustain the jurisdiction when the State is a party, the right asserted must be such as the judicial power is capable of deciding. It must not be a mere *political* right, but one which relates to its proprietary interests.

The distinction is thus stated in Georgia v. Stanton—"We agree that the bill filed presents a case, which, if it be the subject of judicial cognizance, would in form come under the familiar head of equity jurisdiction—that is, jurisdiction to grant an injunction, to restrain a party from a wrong or injury to the rights of another, where the danger actual or threatened is irreparable, or the remedy at law inadequate. But, according to the course of proceeding under the head of equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger must be the rights of persons, or property, *not merely political rights*, which do not belong to the jurisdiction of a court either in law or equity." 6 Wall, 75.

The right asserted by the State of South Carolina does not fall within this limitation. She insists upon the fulfilment of a compact that the river should be forever free from any obstruction or molestation, and avers that the act of defendants in diverting the water therefrom "greatly interrupts the navigation thereof, so as to prevent the use of it by the citizens of the State, and obstructs the commerce between the States of South Carolina and Georgia."

The right set up under the compact involves in no just sense the consideration of a *political question*. In all its aspect it is purely a question of proprietary interest, and as that question arises on a compact, the construction of that compact, as has been frequently decided, is properly the subject of judicial determination.

In opposition to the jurisdiction the Sol. General as-

serts that the State of South Carolina "shows no other right than is shared by it with forty millions of other persons in the United States."

This is not true. The citizens of the State, the riparians, as well as others, have much greater interest in preserving the navigation of the river than those of any other can possibly have. As to the State of Georgia her interest is to build up her seaport at Savannah, and if in so doing she can at the same time deprive the city of Charleston of one of her highways of commerce in violation of her compact, she will advance the proprietary interests of her own citizens, and to that extent, destroy the like interests of the citizens of South Carolina.

But if the assertion were true, we do not see that it would deprive the State having a common interest from asserting the right without, indeed, it could be maintained that no bill could be filed without a joinder of all who are interested.

Assuming that the State is the proper party to seek redress, and the Federal judiciary is the proper tribunal to enforce it, we insist that the equity side of the court is properly invoked by a bill for an injunction.

We have already cited for another purpose the case of Georgetown *vs.* Canal Co. On the question in that case whether a bill for injunction was the proper remedy, the court said:

"The jurisdiction has been finally sustained upon the principle that equity can give more adequate and complete relief than can be obtained at law. While, therefore, it is admitted that it is confessedly one of delicacy, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief, before the tardiness of the law could reach it."

In the Wheeling Bridge case the bill was filed to remove the obstruction created by the bridge in the navigation of the river. On the question of jurisdiction the court say: "If the construction complained of be an injury, it would be difficult to state a stronger case for the extraordinary interposition of a Court of Equity. In no case could a remedy be more hopeless by action of common law."

It would therefore seem to be clear if South Carolina has any judicial redress, the remedy by injunction is the proper one.

In describing the character of the bill in the Wheeling Bridge case, the court say:

"In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a State are adequate to the protection of its own citizens, *and no other jurisdiction can be exercised over them or in their behalf except in a few specified cases.* Nor can the State prosecute this suit on the ground *of any remote or contingent interest in itself.* It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court *can redress its wrongs and save it from irreparable injury.*"

This general description of the bill is relied on by the Solicitor General as establishing the want of jurisdiction in the case now before us, and this is his postulate.

"The rights of navigation and the riparian rights asserted, must belong to the State in its *private capacity*, as a member of a corporation or co-partnership, or owner of canals, railroads, &c., as was in the Pennsylvania case."

Let it be observed that the *subject* of the complaint in the case cited is the *obstruction of navigation.* The same subject is presented by the bill of South Carolina.

And as in the one, obstructions of navigation was held to confer Equity jurisdiction on the ground of "irreparable injury," such jurisdiction equally attaches in the other.

The interest now sought to be protected is not 'tingent," neither is it "remote," but is a prese "direct interest in controvesy" between the part gant.

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Hence it is insisted that to maintain the jurisdiction the state must claim the right "*as a member of a corporation or co-partnership,*" *&c., &c.*

This attempted limitation to the jurisdiction, interpolates into the Constitution and act of Congress, words which would defeat in a great degree the very object for which that jurisdiction was established.

It is also in direct conflict with the decisions heretofore made, epecially those in respect to boundary, which incidentally carried along the right of political jurisdiction.

So far from its being true, that the jurisdiction can only be maintained where the State sues as a "member of the corporation or partnership" the very reverse is the established law.

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corporation, its sovereignty is not involved in the business but it stands and is treated as other stockholders or partners."

It is "from the *dignity of the State* that the Constitution gives to it the right to bring an original suit in this Court." (13 How., 560.)

The Constitution was adopted by the people of those great political corporations known as States. The union of these constitutes the United States.

When, therefore, it is provided that the Supreme Court shall have original jurisdiction "of all controversies of a civil nature where a *State* is a party," we have an accurate reference to one of these political corporations instituted for the protection of the rights of those who inhabit its territory.

Of course, if Congress has the power to obstruct the navigation, and has exercised it, then there is an end of the controversy.

The objection now made is independent of these considerations. It assumes that the defendants are acting without authority; that an irreparable injury is threatenened, but denies that the State has such an interest as entitles it to judicial protection.

If the State cannot file the bill in this Court, the same ground will debar it from appearing in the Circuit Court. And as it has been held that the citizens of the State could not enforce the compact, we have the case of a great wrong without any adequate judicial redress.

Must then the State resort to force to maintain her rights? If the defendants were acting under a law of Georgia could not the controversy be settled by the peaceful means of judicial determination, or must the

two States be left to the arbitrament of arms to determine the rights and obligations under their compact.

We insist, with confidence, that it was the intention of the framers of the constitution to avert such strife by providing a judicial tribunal for a peaceful determination of "all controversies between the States, or between a State and citizens of another State."

All that is needed to properly invoke this jurisdiction is—

The State must be a party on the record.

The interest for which protection is asked, must be a present existing interest in the controversy.

The subject of controversy must be such as is appropriate to judicial cognizance, that is, it must not be political in its character.

The Obstruction.

The late fatal epidemic at Savannah imposed an obstacle to the taking of evidence in this case, to show the particular character of the obstruction complained of and the extent of damage occasioned thereby.

Nevertheless the counsel for complainant relying upon the terms of the compact and the admissions of the answer believe that the questions of law arising in this controversy can be fully and fairly determined on the record as it stands.

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The work at the "cross-tides" which is sought to be arrested, it is admitted will divert the flow of water ~~into~~ from what, for brevity, we shall designate the Carolina River into the River of Georgia.

In the view of the Solicitor General if the contemplated structure does not divert sufficient water to accomplish the deepening of the channel in the Georgia river then the whole flow may be diverted if that will secure

the result, and this claim seems to be the logical result of the power asserted.

It is in this view that counsel for the complainant are willing to submit the controversy as it now stands before the court.

The compact declares that the *locus in quo* should be forever " exempt from all duties, tolls, hindrance, interruption or molestation.

It would be impossible to coin words more apt for securing this navigation from all interference.

In construing this compact, the rights and obligations therein specified will be enforced according to the stipulations of the parties. It will be no answer to say it is true that the work does obstruct the navigation, but a sufficient flow of water is left for small boats.

In the case of Green v. Biddle, the question presented was whether a law passed by Kentucky, regulating the recovery in actions of ejectment, impaired the obligation of the compact made between that State and Virginia in 1789.

This case was twice heard; Story, J. delivering the first, and Washington, J. delivering the second opinion of the court. In determining that the statute of Kentucky violated the compact, the court use this emphatic language.

"The objection to a law on the ground of its impairing the obligation of a contract, *can never depend upon the extent of the change which the law effects in it.* Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, *however minute or apparently immaterial* in their effect upon the contract of the parties, *impairs its obligations.*"

This decision would rule the present controversy even if the defendants were justifying under a law of Georgia.

But there is no such law, and if the act of Congress confers no authority, as we maintain it does not, then the defendants are mere trespassers.

In such a condition, it surely cannot be in their power to resist successfully the injunction prayed for, on the ground that their act would only produce a partial ~~using~~ injury to the complainant, that it violated the right secured by the compact only to a small degree, or that the general benefit it would promote was greater than the injury complained of.

On an indictment for a nuisance in obstructing navigation, the defendant set up the plea of the public benefit arising from the work complained of, and the jury, under the instruction of the judge at *nisi prius*, found that the "inconvenience of the impediment was counterbalanced by the public benefit arising therefrom."

In overruling this instruction Lord Denman, C. J., said: "If the violation of the rights which belong to any part of the public, is to be vindicated by the benefit which may arise to another part of the public elsewhere, we are introducing inquries of a most vague and unsatisfactory nature, and entering into speculations which no jury can be properly expected to decide."

King *vs.* Ward, 4 Ad. and El., 384.

Upon the foregoing considerations we respectfully submit, that the injunction which has heretofore been awarded must be made perpetual.

P. PHILLIPS,
Sol'r for Complainant.
JAS. B. CAMPBELL,
Of Counsel.

In the Supreme Court, of U. S.

STATE OF SOUTH CAROLINA *against* ALPHONSO TAFT, *Sec. of War*, A. A. HUMPHREYS, *U. S. A.*, L. Q. GILMORE, *U. S. A., et al.*	BILL IN EQUITY PRAYING INJUNCTION.

W. H. Trescot's Points and Authorities.

I. Character and History of Treaty of Beaufort, 1787. Its terms are perpetual.

Biordan & Duane, U. S. Laws, vol. 1.
1 vol. Stat. at Large, So. Ca.
Wheaton's Int. Law, part II, chap. II, § 268.
Heffter Droit Int., p. 170.
Chirac vs. Chirac, 2 Wheaton, 259.
Chappell's Historical Mis. of Georgia, part II, p. 65.
Bancroft, 8th vol., 137; 9th, 257.
Articles of Confederation, American Archives, vol. 4, 352–359.

II. That Georgia and South Carolina were competent and authorized to execute this treaty.

Articles of Confederation.
Harcourt vs. Gaillard, 12 Wheaton, 523.
Spooner vs. McConnell, 1 McLean, 347
Journal American Congress, vol. IV.
2 Stat. at Large, 57.

III. That the adoption of the Federal Constitution did not abrogate the treaty.

Constitution of U. S.
Spooner vs. McConnel, 1 McLean, 337.
Ordinance of 1787.
Wilson vs. Blackbird, Creek Co., 3 Peters, 245.
Hogg vs. Zanesville Manf. Co., 5 Ohio, 410.
Woodbourn vs. Kilbourn Manf. Co., 1 Abbott, 158.
Pollard vs. Hogan's Lessee, 3 Howard, 212.
Permolli vs. 1st Municipality, 3 Howard, 589.
Strader vs. Graham, 10 How., 82.
Dred. Scott, 19th Howard, 396.
Howard vs. Ingersoll, 13, How., 405.
American State Papers, Public Lands, vol. 1, p. 103, U. S.. Stat. at large, vol. 2, 1802.
President's Message, 1835, Dec. 8th, Senate Doc. 1, p. 108.
Engineer Report 1838, Mss.
Pres. Message, Feb. 1840, Doc. 2.
Pres. Message, July, 1850, Ex. Doc., 19.
Appropriation Acts, 1828 to 1873.
Annual Report, Gen. Gilmore, 1873, p. 16, 17.
Gilman vs. Philadelphia, 3 Wallace, 928.
Fowler vs. Lindsey, 3 Dallas., 411.

P. Phillips' Points and Authorities.

The acts of Congress should be so construed as not to invade the rights of the State under the compact.

Aldridge vs. Williams, 3 How., 24.
Savings Bank vs. U. S., 19 Wall, 237.
Fisher vs. U. S., 2 Cr., 385.
U. S. vs. Kirby, 7 Wall, 486.
Dash vs. Vankleek, 7 John, 502.
Cohens vs. Virginia, 6 Wheat, 264.
Comm. vs. Dounes, 24 Pick, 230.

Jurisdiction.

The State is the proper party complainant.

Georgetown vs. Canal Co., 12 Pet., 91.
Cohens vs. Virginia, 6 Wheat, 264.
Georgia vs. Stanton, 6 Wall, 75.

The equity side of the Court is properly invoked.

Wheeling Bridge Case, 13 How., 560.
Georgetown vs. Canal Co.

The Court will not enter into the question as to the degree of the obstruction.

Green vs. Biddle, 8 Wheat, 2.
King vs. Ward, 4 Ad. & El., 384.

P. Phillips
for Complt

Supreme Court of the United States.

THE STATE OF SOUTH CAROLINA
against
ALPHONSO TAFT, SECRETARY OF WAR, A. A. HUMPHREYS, U. S. A., L. Q. GILMORE, U. S. A., AND OTHERS.

Bill in Equity Praying Injunction.

ARGUMENT OF WM. HENRY TRESCOT,

Of Counsel for Plaintiff.

The facts under which this case comes before the court are these.

The Congress of the United States, by virtue of the power expressly granted "to regulate commerce," and the implied power resulting therefrom to improve the navigation of rivers and harbors for the purposes of commerce, passed an act in 1873 which contains this clause: "For the improvement of Savannah river and harbor, 50,000 dollars."

Under the authority of this act, the Engineer Department of the United States Government, in charge of river and harbor improvements, proceeded to the construction of a dam across the main channel of the Savannah river, between Hutchinson and Argyle islands, known as the cross-tides, for the avowed purpose, as stated in the engineer's reports and admitted by the answers of the defendants, of deflecting sufficient water from the main channel of the Savannah river to increase the channel of the south branch of the same, known as Front river, thus interrupting, hindering, and molesting the navigation of the main channel.

The State of South Carolina, exercising her right as a State to sue in this court, has filed a bill in equity, alleging not only that this dam is an obstruction to the navigation of the river, which threatens certain and irreparable damage to her citizens, who are riparian owners thereon, but that its erection is a direct violation of the law of the land, securing to South Carolina certain rights, privileges, and franchises in the said river; which law is contained in the Treaty of Beaufort of 1787, executed by the States of South Carolina and Georgia, before the adoption of the Federal Constitution, but still of force and obligation, and guarantees that the main channel of the Savannah river shall be "exempt from all tolls, duties, interruption, hinderance, or molestation whatever;" and she therefore prays the injunction of the court against the further prosecution of this obstruction.

The argument addressed to the court will attempt to show—

1. That by its character and history, the terms of the Treaty of Beaufort of 1787 are of permanent and perpetual obligation.

2. That the States of South Carolina and Georgia were at the date of its execution independent political societies, competent and authorized to negotiate and execute such a treaty between themselves.

3. That the adoption of the Federal Constitution did not abrogate or modify the said treaty, nor confer power upon any department of the Government to abrogate or modify it, without the consent of the original parties.

If these propositions are true, then the Treaty of Beaufort is to-day the law of the land, binding upon the Government of the United States and its agents, and the only remaining question will be whether the remedy sought by the State is the appropriate remedy and whether it has been sought in the proper manner.

1. The character and history of the treaty.

After the separation of the Carolinas into North and South

Carolina, the colony of South Carolina extended by its charters from the North Carolina line, on the north, to the waters of the St. Mary's river, on the south, its boundaries running from the North Carolina line on the one side and the head waters of the St. Mary on the other, indefinitely westward to what was then called the South Seas.

In 1732, the colony of Georgia was created, and its territory, extending from the Savannah river, on the north, to the Altamaha, on the south, and also running indefinitely westward from the head waters of those rivers, was cut out of the colony of South Carolina, South Carolina claiming, however, to retain and exercise her right over all the territory between the Altamaha and the St. Mary's.

In 1763, when by treaty with Spain the boundary between Florida and the British Colonies was adjusted, the king of Great Britain, by proclamation, took from South Carolina and annexed to Georgia the territory between the Altamaha and the St. Mary's. In this transfer South Carolina never acquiesced, and when, after the commencement of the Revolution, and upon the recommendation of the Congress of the Confederation, South Carolina, in 1776, and Georgia, in 1777, established independant governments, there were several questions of boundary and territory pending between them.

South Carolina and Georgia both claimed the territory between the Altamaha and the St. Mary. Georgia claimed the territory lying between the Tugaloo and the Keowee, while South Carolina insisted that the Tugaloo and not the Keowee was the continuance of the Savannah river. Which of the two branches of the Savannah was the main channel, and therefore the boundary-line, was not decided, and consequently the islands in the river were subject of dispute.

These differences were settled by the treaty of 1787. South Carolina abandoned her claim to the territory between the Altamaha and the St. Mary's. Georgia abandoned her claim to the territory between the Tugaloo and the Keowee, accepting the head waters of the former as the source of the Savan-

nah. The main channel of the Savannah was fixed, and as that left some of the islands on either side of the boundary, the islands were all yielded to Georgia in exchange for the perpetual freedom and exemption from obstruction of the Savannah river, as described in the treaty.

The first characteristic, then, of this treaty is that it is an exchange of positive values; that for the privilege of keeping the Savannah river, as described in the treaty, free for all time from "all duties, tolls, hindrances, or molestation whatever," South Carolina paid in territory, giving up her claim to the lands beyond the Altamaha, yielding possession of the islands in the Savannah and Tugaloo rivers, and recognizing the absolute ownership of Georgia to all the rest of the river, by which recognition a navigable branch of the river was secured to Georgia, passing in front of the city of Savannah, and in which, as far as the commercial interests of that port were concerned, she could make what improvements and lay what tolls and erect what obstructions she pleased.

Any action, therefore, which deprives South Carolina of this right to keep the Savannah open and free from all hindrance, interruption, or molestation whatever, is the destruction of that part of the treaty which was the inducing compensation on her part to its adoption, and, in fact, makes of the treaty not a compact, not a mutual instrument, but an unconditional and uncompensated cession of territory by South Carolina to Georgia. And it is equally clear that, even if the paramount authority of the Federal Government should be considered sufficient to overrule this limitation, that no power exists in that authority to compensate South Carolina for the loss of her privilege; for the territory with which she purchased it could never be returned, and the Federal authority has no right to require the people of the United States to pay South Carolina for the exercise of what is claimed to be a constitutional power.

The claim, then, on the part of the Federal Government to erect this obstruction is a claim to annul this treaty, to set

aside this compact at the sole cost of one of the contracting parties, and for the express benefit of the other, who has already received compensation for covenanting that that shall never be done which it is now proposed to do, and without any power to do justice between the parties to the contract when the contract shall have been abrogated.

The second characteristic of this treaty is that its conditions are permanent; that it is one of those treaties familiar to international law which accomplish their purpose by execution, and are beyond the changes and chances of circumstance.

Without affecting a parade of authorities upon so well-established a principle, I will content myself with a quotation from an authority which sums up the learning on the subject very clearly and briefly:

"General compacts between nations may be divided into what are called transitory conventions and treaties, properly so termed. The first are perpetual in their nature, so that being once carried into effect they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may in some cases be suspended during war, they revive on the return of peace without any express stipulation. Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favor of one nation in the territory of another."

Wheaton, Part II, Chap. II, § 268.

The Treaty of Beaufort is a cession, a determination of boundaries, an exchange of territory, and the creation of a permanent servitude.

See, also, Heffler, Droit. Int., p. 179.

The Government of the United States has repeatedly and emphatically maintained this doctrine, and the permanent, unalterable character of such provisions of a treaty as regulate boundaries and the creation of States will be found fully explained and defended in the correspondence between J. Q.

Adams when Minister to England and Lords Bathurst and Castlereagh. (See Amer. Arch., For. Rel., vol. 4, pp. 352, 359.) The English government was disposed to maintain that the war of 1812 abrogated all former treaties and opened anew certain questions of boundary and rights of fishery. In his letter to Mr. Monroe giving an account of his conversation with Lord Bathurst, Mr. Adams says: "It was obvious that the treaty of peace of 1783 was not one of those ordinary treaties which by the usages of nations were held to be annulled by a subsequent war between the same parties; it was simply a treaty of peace; it was a treaty of partition between the parts of one nation agreeing thenceforth to be separated into two distinct sovereignties."

Am. Ar., For. Rel., v. 1, 351.

"The treaty of 1783 is by a tacit understanding between the parties, and without any positive stipulation, constantly referred to as the fundamental law of the relations between the two nations."

Ib., 353.

Now this treaty belongs to this same class of treaties—is the same in kind, if not degree. Its object was to ascertain territorial extent and boundaries. Just as the treaty of 1783 established the territorial extent of the United States, the privileges of its citizens in certain waters, and settled the common rights of the contracting parties as to the navigation of the Mississippi, just so this treaty of Beaufort established the territorial extent of South Carolina and Georgia and settled the common rights of citizens of the two States as to the navigation of the Savannah; and thus, so far as these questions were concerned, became, in the very language of Mr. Adams, "the fundamental law of the relations between the two" States—that fundamental law being not merely that the northern branch of the Savannah river should be the boundary line, but the northern branch "exempt from all duties, tolls, hindrance, interruption, or molestation whatever."

And I do not know that I could state the permanent effect of this treaty with more precision or force than in the language of Chief-Justice Marshall in the case of Chirac *vs.* Chirac, (2 Wheaton.)

In that case a treaty with France, perpetual by its original provision, was afterwards, by the consent of both parties, limited in duration and force to a period of eight years. The question was how certain rights, acquired under the original treaty, would be affected by the subsequent limitation.

Chief-Justice Marshall says: "The treaty was framed with a view of being perpetual. Consequently its language is adapted to the state of things contemplated by the parties, and no provision could be made for the event of its expiring within a certain number of years. * * * It will be admitted that a right once vested does not require for its preservation the continued existence of the power by which it was acquired. If a treaty or other law has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right. * * * The court is of opinion that the treaty had its full effect the instant a right was acquired under it, and that it had nothing to perform, and that its expiration or continuance afterwards was unimportant."

I submit, therefore, that this treaty is a permanent one, and that until altered by the consent of the original parties it is the fundamental law of their political existence, incorporated into their life before they became component parts of the United States, making them, as to boundary and territory, what they were when they adopted the Constitution, and of living and lasting obligation between them.

The only other remark I would make as to the character of this treaty is that its merits are outside of the discussion; that whether it was on either side a wise or a foolish bargain is not a matter of present consideration; that Georgia and South Carolina were and are the only judges of that; and the only question for the court is whether they did make the contract, not at all whether they ought to have made it. But

in this connection I would say that such provisions as this limitation upon future obstruction of the Savannah river are familiar and common in the history of treaties. It is not necessary to take up the time of the court with examples; but there is one to which I will refer, because it was the subject of repeated and very famous discussion. It was the case of the Scheldt, which was closed to the Belgic provinces in favor of the Dutch by the Treaty of Westphalia in 1648, and although it ran by far the greater part of its course through the Belgic provinces, and its closure was the commercial destruction of the great and ancient city of Antwerp, it was maintained until the French revolution—1792—when its forcible opening was made cause of war between Great Britain and Holland on one side and France on the other. And during the discussion at that date, Mirabeau published a very celebrated pamphlet, in which he maintained the permanent and lasting character of the treaty obligations of 1648, notwithstanding the change in national relations and the unnatural and unreasonable hardships which it imposed upon the Belgic provinces.

In that case, as the court will observe, the advantage was entirely upon one side, and the stipulation was the direct cause of grievous injury and loss to the other of the contracting parties; while in this treaty, not only there was in the terms themselves a fair exchange of values, but there was to the State of Georgia a resulting consequence of no small importance. The territory which was in dispute between the States comprised all that large and valuable country which became afterwards the States of Alabama and Mississippi, and especially that whole tract of country which Georgia sold to various land companies in 1789, and which formed the subject-matter of the famous Yazoo controversy, the rights of which were adjudicated by this court in Fletcher *vs.* Peck. And in reference to these sales, a well-informed historian of Georgia says: "For years they (the purchasers) had stood on the watch for a favorable mo-

ment for taking hold. The main cause which had kept them back was the unsettled state of the title, which was in strong dispute between South Carolina and Georgia, and they cared not to have to treat with two contending States, or to buy from either what was contested and claimed by the other. At length, by the Convention of Beaufort, in April, 1787, this dispute was settled in favor of Georgia."

Miscellanies of Georgia, Historical, &c., A. H. Chappel, Part II, p. 65.

I think, then, I may venture to assume that, looking at the character and terms of this treaty, this court, if sitting as international arbitrators between two independent sovereignties, would have no shadow of doubt as to its construction, and would hold without hesitation that its terms and compromises were of permanent obligation, and as binding to-day upon the parties to the contract as they were when they were signed, and the rights of the two States to their present territories ascertained and fixed.

If I am so far right, then there are but two questions submitted to the decision of the court.

1. Were Georgia and South Carolina at the date of the treaty, States, having such independent existence, as authorized them to make such a treaty; and,

2. After making it, did the voluntary adoption of the Federal Constitution by Georgia and South Carolina modify or abrogate the treaty, or give to the Federal Government the right without their consent to abrogate or modify it.

1. That the States of Georgia and South Carolina had such independent and recognized political existence previous to the adoption of the Constitution and at the date of this treaty as authorized the negotiation of such a treaty. This does not require elaborate argument.

In 1775 Congress recommended to the separate Colonies "to call a full and free representation of the people, and that the representatives, if they think it necessary, establish such

forms of government as in their judgment will best produce the happiness of the people, and most effectually secure peace and good order in the province during the continuance of present dispute between Great Britain and the Colonies." South Carolina adopted her constitution in March, 1776, and Georgia in February, 1777.

Bancroft, 8th, 137; 9th, 257.

The second of the articles of confederation declares: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled."

Art. Confed.

In the instructions to the ministers abroad in 1779, Congress says: "You are, therefore, strongly to contend that the whole of the said countries and islands lying within the boundaries aforesaid, and any island, fort, post, place, harbor, and road to them belonging, be absolutely evacuated by the land and sea forces of His Britannic Majesty, and yielded to the powers of the States to which they may respectively belong in such situation as they may be at the termination of the war."

Am. Ar., vol. 6, p. 867.

Again: "As this territory lies within the charter limits of particular States, and is considered by them as no less their property than any other territory within their limits, Congress could not relinquish it without exciting discussions between themselves and those States concerning their respective rights and powers which might greatly embarrass the public councils of the United States and give advantage to the common enemy."

It is therefore incumbent on us to show—

"1. That the territorial rights of the thirteen United States are to be determined by their colonial history and charters.

"2. That the United States have succeeded to these rights as independent sovereignties.

"3. That if vacant lands cannot be demanded upon the title of individual States, then they belonged to His Majesty, and were devolved upon the United States collectively."

In 1782, these instructions were repeated, and after a minute history of the titles of the various colonies, Congress says: "The proprietors could not separate the colonies of Virginia, North Carolina, South Carolina, and Georgia; that the king, upon the resumption of their charters, succeeded to the obligations of the proprietors, not only from the nature of the contract with the people, but from his own acts and those of his governors; that these colonies became thereby royal governments, standing in the same rank with Massachusetts; that, consequently, the king of Great Britain was lord paramount of these colonies by being the chief magistrate of each of them, and that this chief magistracy having fallen to them, carries with it the paramountship."

Am. Ar., For. Rel., vol. 6, p. 880.

This view is confirmed by the fact that in every case the United States took from each State a cession of its territory as from the only sovereign power capable of alienating it.

The Supreme Court, in Harcourt *vs.* Gaillard, (12 Wheaton,) has held that, by the Treaty of Peaceof 1783, the United States acquired no territory for the Federal Government, but acquired all territory for the States in which by charter and colonial limits it lay.

And the established constitutional doctrine may be summed up in the brief but emphatic language of Mr. Justice McLean, in declaring the opinion of the court in Spooner *vs.* McConnell:

"Prior to the formation of the Federal Constitution the States were sovereign in the absolute sense of the term. They had established a certain agency under the articles of confederation, but this agency had little or no power beyond that of

recommending to the States the adoption of certain measures. It could not properly be denominated a government."
1 McLean, 347.

But conclusive as is this argument as to the independent powers of the States at that date, it is not necessary to press it, because these States executed the treaty of 1787 after they had adopted the articles of confederation, and the treaty was negotiated and signed in strict conformity with the express provisions of those articles.

By article 6 it was provided: "No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into and how long it shall continue.

By article 9 it was provided: "The United States, in Congress assembled, shall also be the last resort or appeal in all disputes or differences now subsisting or that may hereafter arise between two or more States concerning boundary, jurisdiction, or any other cause whatever, which authority shall always be executed in the manner following," and then follows the mode of constituting a court for the trial of such differences.

Under this clause three cases came before the Congress of the Confederation—one between Pennsylvania and Connecticut, one between New York and Massachusetts, and one between South Carolina and Georgia.

The case between Pennsylvania and Connecticut was adjudicated by a court regularly appointed, and sitting at Trenton. The record of its proceedings and its judgment in favor of Connecticut were duly forwarded to Congress, and it may be stated here, to show the controlling obligation of this action under the articles of confederation, that when, in 1802, an act was passed by Congress in reference to the cession of the Connecticut Reserve, this proviso was inserted: "*Provided*, That nothing in this act, nor anything contained therein, shall be construed so as in any manner to draw in

question the conclusive settlement of the dispute between Pennsylvania and Connecticut by the decree of the Federal court at Trenton."

2 Stat. at Large, 57.

The case between Massachusetts and New York proceeded as far as the constitution of the court; but, on the 8th of October, 1787, Congress adopted the following resolution:

"Whereas it appears by the Journals of Congress that a Federal court has been instituted, pursuant to the articles of confederation and perpetual union, to hear and determine a controversy respecting territory between the States of Massachusetts and New York; and whereas it appears by the representations of the Delegates of the said States in Congress that the said controversy has ceased and the same has been settled and determined by an agreement entered into on the 16th day of December last by the agents of the said States, and any further proceedings in or relative to the aforesaid court having become unnecessary—

"*Resolved*, That all further proceedings in and relative to the said Federal court, as also the commissions of the judges thereof, cease and determine."

Journal American Congress, vol. iv, page 787.

In the case of South Carolina against Georgia the following proceedings took place, commencing the 1st June, 1785, and ending 9th August, 1787:

On the 1st June, 1875, upon the report of a committee to whom the petition of South Carolina had been referred, Congress passed the following resolution:

"*Resolved*, That the second Monday in May next be assigned for the appearance of the States of South Carolina and Georgia by their lawful agents, and that notice thereof and of the petition of the legislature of South Carolina be given by the Secretary of Congress to the legislative authority of the State of Georgia in the following form."

Journal American Congress, 1774 to 1788, vol. iv, page 529.

By other resolutions of Congress the time for the appearance of the agents of the said States was extended to the first Monday in September, 1786.

Journal American Congress, vol. iv, pages 634–644.

On the 4th of September, 1786, according to order, the agents for the States of South Carolina and Georgia attended, in pursuance of the act of Congress and the notification given the 1st June, 1785, and produced their credentials, declaring at the same time that they had respectively examined each other's credentials, and were satisfied with the powers therein contained. The credentials were then read.

Journal American Congress, vol. iv, 691–693, where the credentials will be found.

Congress then resolved, "That the agents for the States of South Carolina and Georgia be, and they are hereby, directed to appoint, by joint consent, commissioners or judges, to constitute a court for hearing and determining the matter in question, agreeably to the 9th of the articles of confederation and perpetual union."

Idem.

On the 11th September, 1786, the agents of the State of South Carolina reported that they were unable to agree with the agents of the State of Georgia in the selection of judges and the fixing the time and place for holding the court, and prayed that Congress will appoint the court and the time and place of meeting. Upon which report it was ordered, "That the agents for Georgia be furnished with a copy of the said report and prayer."

Journal American Congress, vol. iv., p. 695.

On the 13th of September, 1876, the agents for South Carolina and Georgia attending, the agents for the State of Georgia, for answer to the notice given them of report and prayer of the agents of South Carolina, say that they have

attended, agreeably to the order of Congress, but have not been able finally to agree with the agents of South Carolina upon the proper time for holding the said Federal court; that they are desirous to proceed in such manner as that a legal and righteous decision may be had in this cause; and that by the act of the legislature of the State of South Carolina, passed on the 22d day of March, 1786, three commissioners are to be chosen, and invested with full power and authority in behalf of said State to settle and compromise all and singular the differences, controversies, disputes, and claims which subsist between that State and the State of Georgia relative to boundaries, and to establish and permanently fix the boundaries between the said States, provided the State of Georgia will appoint and vest commissioners with equal powers; and if it should so happen that the said commissioners may not be able to settle and compromise the said differences, then, and in that case only, the Governor of South Carolina is authorized to appoint and direct agents in behalf of that State to proceed, agreeably to the 9th of articles of confederation, finally to determine the dispute subsisting between the said States of South Carolina and Georgia respecting their territorial claims. That the legislature of the State of South Carolina did, on the — day of ——, appoint three commissioners, vested with the powers and for the purposes aforesaid, and transmit information thereof to the State of Georgia, requesting that State to appoint and vest commissioners with sufficient power mutually to settle and compromise all differences between the said States respecting their territory and boundary; that the State of Georgia has not yet had reasonable time to decide on the proposition made by South Carolina and to transmit the result. Under these circumstances the agents of the State of Georgia suggest that the agents of the State of South Carolina are not legally authorized to press that Congress should immediately proceed, agreeably to the 9th of the articles of confederation, for a speedy and final decision

in this case; that they, notwithstanding, relying on the wisdom, equity, and justice of Congress, are content to act in such manner as they may direct.

A motion was then made by the delegates of Georgia that Congress proceed to strike a court in the manner pointed out by the confederation, for the trial of certain territorial claims between the States of South Carolina and Georgia, to be held at the city of New York on Monday, in May next. The latter part of the motion being postponed, nine members were chosen to constitute the court.

Journal American Congress, vol. iv, page 696.

On the 21st of September, 1786, after some debate, Congress resolved that the court appointed to hear and determine the matter in question between the States of South Carolina and Georgia be summoned to meet at the city of New York on the third Monday of June next.

Journal American Congress, vol. ix, page 697.

Seven of the members so chosen accepted the appointment, and two declined.

Journal American Congress, vol. iv, page 720.

In the meantime, the States of South Carolina and Georgia entered into the convention known as the Convention of Beaufort, and on the 9th of August, 1787, a motion was made by the delegates of South Carolina—

That the convention held and concluded between the commissioners of the States of South Carolina and Georgia, at Beaufort, in the State of South Carolina, on the 28th day of April, in the year of our Lord 1787, in the words following, to wit, (then comes recital of the convention,) be ratified and confirmed, and that the lines and limits therein specified shall be hereafter taken and received as the boundaries between the said States of South Carolina and Georgia forever. This motion was committed by unanimous vote.

Journal American Congress, vol. iv, pp. 769–771.

Immediately upon this action of the Congress, upon the very same day, the State of South Carolina, by its agents, Jno. Kean and Daniel Huger, members of Congress, ceded to the United States all the western territory acquired by this treaty lying beyond the Tugaloo, and the cession is recorded on the same page of the Journal with the ratified treaty:

"In virtue of the powers in them vested, the delegates of the State of South Carolina, for and in behalf of the said State, executed the following deed of cession to the United States of America:

"*To all who shall see these presents, we, Jno. Kean and Daniel Huger, the underwritten delegates for the State of South Carolina in the Congress of the United States, send greeting:*

"Whereas the General Assembly of the State of South Carolina on the 8th day of March, in the year of our Lord 1787, passed an act in the words following, viz: 'An act to authorize the delegates of this State in Congress assembled to convey to the United States in Congress assembled all the right of this State to the territory herein described; whereas the Congress of the United States did on the 6th day of September, in the year 1780, recommend to the several States in the Union having claims to western territory to make a liberal cession to the United States of a portion of their respective claims for the common benefit of the Union; and whereas this State is willing to adopt every measure which can tend to promote the honor and dignity of the United States, and strengthen their Federal union: Be it therefore enacted by the honorable the senate and house of representatives in General Assembly met and sitting, and by the authority of the same, that it shall and may be lawful for the delegates of this State to the Congress of the United States, or such of them as shall be assembled in Congress, and they are hereby fully authorized and empowered for and on behalf of this State, by proper deeds or instruments in writing under their hands and seals, to convey, transfer, assign, and make over unto the United States in Congress assembled, for the benefit of the said States, all right, title, and claim, as well of soil as jurisdiction, which this State hath to the territory or tract of country, within the limits of the charter of South Carolina, situate, lying, and being within the bound-

aries and lines hereinafter described; that is to say, all the territory or tract of country included within the river Mississippi and a line beginning at that part of the said river which is intersected by the southern boundary line of the State of North Carolina, and continuing along the said boundary line until it intersects the ridge or chain of mountains which divide the eastern from the western waters; then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo river to the said mountains, and thence to run a due west course to the river Mississippi. In the senate house, the 8th day of March, in the year of our Lord 1787, and in the eleventh year of the independence of the United States of America. John Lloyd, President of the Senate; John Julius Pringle, Speaker of the House of Representatives. And whereas the said John Kean and Daniel Huger were, on the 6th day of March, 1787, elected delegates to represent the State of South Carolina, according to the law of the said State, in the Congress of the United States, until the first Monday in November, in the said year 1787, which election remains in full force, and the said John Kean and Daniel Huger are the lawful delegates of the said State in the Congress of the United States. Now, therefore, know ye that we, the said John Kean and Daniel Huger, by virtue of the power and authority to us committed by the said act of the General Assembly of South Carolina, before recited, in the name and for and in behalf of the State of South Carolina, do by these presents assign, transfer, quit claim, cede, and convey to the United States of America, for their benefit, (South Carolina inclusive,) all the beforementioned and described territory, or tract of country, as the same is bounded and described in the said act of Assembly, for the uses in the said recited act of Assembly declared. In witness whereof we have hereunto set our hands and seals, this 9th day of August, in the year of our Lord 1787, and of the sovereignty and independence of America the twelfth. Jno. Kean, (L. S.) Daniel Huger, (L. S.) Signed, sealed, and delivered in presence of Charles Thompson, Roger Alden, Benjamin Bankson. Aug. 9, 1787."

Journal of Congress, 4th vol., 771.

Thus, in the three cases, one proceeded to final judgment, and the two others, including that of South Carolina and

Georgia, were settled by treaties, made with "the consent of the United States in Congress assembled, specifying accurately the purposes for which the same were entered into."

Therefore, whether the States of South Carolina and Georgia be considered, in the words of Judge McLean, "as sovereign in the absolute sense of the term," or whether it be considered that the articles of confederation created a real but imperfect nationality, imposing certain conditions upon its members, from either point of view South Carolina and Georgia were fully empowered to negotiate and execute the treaty of 1787, and it was at the date of the adoption of the Constitution a perfect contract, binding upon them in all its terms and conditions.

I have thus reached what is the critical question in this case: Did the adoption of the Federal Constitution by South Carolina and Georgia abrogate or modify this contract, or confer upon any authority under that Constitution the power, at its own will and without the consent of the contracting parties, to abrogate or modify it?

It will not be pretended that there is anywhere in the Constitution an express abrogation or modification of this treaty, or that there is anywhere an express grant of power to any department of the Government to abrogate or modify it. This power, if reached at all, can only be reached by a long inference and a remote implication. The process of the argument must be this: The Government possesses by express grant the power to regulate commerce, and from that is derived, by implication, the right to improve navigable rivers and harbors for the purposes of commerce. The Savannah river is a navigable river. Therefore the Government has the right to improve it for the purpose of navigation. Now, leaving this argument just as it stands for the present, let me call the attention of the court to Wilson *vs.* Blackbird Creek Marsh Co., (3 Peters, 245.)

In this case the State had authorized an obstruction across Blackbird creek, and the plaintiffs had destroyed the obstruc

tion, claiming that being a navigable stream it could not of common right be obstructed. Ch. J. Marshall for the court held that, while it was true that the court would be justified in compelling the removal of an obstruction in a navigable stream, yet it would follow the lead of Congress, and that Congress must do something to indicate its intention of holding the stream to be a navigable river before he would interfere in every case where the State exercised its authority over small streams, and the court refused to interfere. The principle of the case is that there may be navigable rivers over which Congress, for reasons deemed sufficient, will not exercise its power to regulate commerce as against the action of a State, and that facts may impress such a character upon a navigable river as to exclude it from the power to regulate commerce. The very question then presents itself, Is the Savannah river a navigable river upon which such character has been rightfully impressed? If it is, then it is excluded from the exercise of the general power; if it is, then the court must follow the lead of Congress, and the Savannah river cannot be controlled by the power to regulate commerce until Congress has decided that it is a navigable river, not subject to the exception we claim for it.

But the Savannah river consists of two branches; the branch running in front of the city of Savannah just as much a navigable river as the other, but the one subject to no restriction, while the other is. Must not Congress decide which of the two is subject to its power before the court will decide? Suppose that the treaty of 1787 had stipulated, not that Back river should be always free from interruption, hindrance, or molestation, but that a dam should be erected at the cross-tides and perpetually maintained. If the engineers had undertaken to remove that, would it not have been claimed, and rightfully claimed, that Front river was the only navigable Savannah river, and that Back river was excluded from the power to regulate commerce by its treaty character until Congress had made it a navigable river? The point I make, then, under

this authority, is that even supposing the Government to have the power, disregarding the treaty, to deal as it pleases with the Savannah, (Back river,) yet its treaty character remains impressed on it until Congress has explicitly abrogated the treaty, for the abrogation of such an instrument cannot be by implication. If Congress has the power to set it aside, it must exercise that power as it would repeal a law, and that a mere appropriation to improve "the Savannah river" is not a necessary implication that Back river must be "interrupted" or "molested."

But to return to the question. Is that treaty abrogated, or can the Government abrogate it?

The general principle which must govern this question I cannot state better than in the language of Mr. Justice McLean, in Spooner *vs.* McConnell, (1 McLean, 337:) "It is a well-established principle that no political change in a government annuls a compact made with another sovereign, or with individuals. The compact is protected by that sacred regard for plighted faith which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the rights and advantages of civilization, and throw us back on the age of vandalism." If this treaty is as I have endeavored to show—a solemn compact between parties competent to make it—then it can only be cancelled or changed by their mutual consent. Suppose that South Carolina had adopted the Constitution, and Georgia had refused to do so for some years after, would the adoption by South Carolina have abrogated or modified the treaty, or conferred upon the General Government any power to interfere with its provisions? Surely not. If three or four years afterwards Georgia had adopted the Constitution, would that have abrogated the treaty? Would the action of Georgia have conferred upon the Federal Government, as regards South Carolina, a power which South Carolina had never granted to that Government? Further, if South Carolina and Georgia, having the right to do so, and

being joint owners of the Savannah river, had mutually relinquished and extinguished their right to interrupt, hinder, or molest the Savannah river, how is it possible that they could ever grant to the Federal Government a right and power which they (the grantors) no longer possessed? It is clear that all the powers of the Government are granted powers, and powers granted by the States out of the sovereign powers which they possessed. Absolute as these powers may be when granted, granted they must be. If, then, Georgia and South Carolina did not possess the power when they adopted the Constitution they could not grant them, and by the treaty of 1787 they had deliberately and completely divested themselves of that power—that is, they had pledged to each other their faith not to use the power which they possessed over the Savannah river, and what they could not use they could not transfer. The abrogation of the treaty of 1787, by mutual consent, was a condition precedent to any such action. And if this abrogation is to be inferred from the single and simple action of adopting the Constitution, something must be shown to indicate that intent. There is nothing in the Constitution itself to warrant such inference; indeed the contrary; for the Supreme Court has decided, and on more than one occasion, that a treaty, a compact, executed before the adoption of the Constitution was binding both upon the States and the Federal Government to a larger extent of limitation and in reference to vastly more important and vital powers than are affected by this treaty.

Let me first ask the attention of the court to the ordinance of 1787—the famous ordinance for the government of the Territory northwest of the Ohio. This was more than an act of ordinary legislation. Besides the clauses which, like other laws, were repealable, it contained a compact.

It recites six articles, of which it declares: "The following articles shall be considered as articles of compact between the original States and the people and States in the said Ter-

ritory, and forever remain unalterable, unless by common consent."

The fourth of these articles is this: "The navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same shall be common highways, and forever free as well to the inhabitants of said Territory as to the citizens of the United States and those of any other State that may be admitted into the Confederacy, without any tax, impost, or duty therefor;" almost a paraphrase of the language of the Treaty of Beaufort, "exempt from all duties, tolls, interruption, hindrance, or molestation whatever."

And just here I would call attention to the date of both of these instruments, 1787, just upon the eve of the adoption of the Constitution, with full knowledge on the part of these both, States and individuals, executing them, that the Constitution was to be submitted for the very purpose of establishing closer relations and a more perfect government. Both of these instruments are arrangements for the future, and can it be supposed that under such circumstances they would have been executed if it had crossed the minds of those concerned that in a few months they would be abrogated or changed by the coming Constitution?

But to return to the ordinance of 1787. As soon as a State was created out of the Northwestern Territory that State would be admitted with powers full and equal to any other State, and if the terms of the "compact" of 1787 were not permanent, then State legislation or Congressional legislation could disregard them. Of course the question arose. In Spooner *vs.* McConnell and others, a citizen of Massachusetts applied to the circuit court of the United States for Ohio for an injunction, alleging that certain obstructions erected in the Maumee river under authority of the Ohio legislature were in violation of the ordinance of 1787.

In delivering the opinion of the court, Mr. Justice McLean says:

"That this ordinance was obligatory in all its parts at the

time of its adoption no one can doubt, and the only inquiry now is whether, by the adoption of the Federal Constitution, the constitution of this State, or by any other means, it has been superseded in whole or part." (1 McLean, 343.)

"The change from a territorial government to that of a State necessarily abolished all those parts of the ordinance which gave a temporary organization to the government, and also such parts as were designed to produce a certain moral and political effect. * * * But in regard to the great question in this case, as to the navigable waters, the State constitution purports to make no alteration; and if the ordinance in this part be annulled, it must be done by implication." (*Id.*, 343.)

"It is a well-established principle that no political change in a government annuls a compact made with another sovereign power, or with individuals. The compact is protected by that sacred regard for plighted faith which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the lights and advantages of civilization, and throw us back on the age of vandalism. The compact was formed between political communities and the future inhabitants of a rising Territory and the States which should be formed within it, and all who became inhabitants of the Territory made themselves parties to the compact. And this compact, so formed, could only be rescinded by the common consent of those who were parties to it." (*Id.*, 344.)

Would it be possible to find language or logic more applicable to the case before the court? Judge McLean illustrates the force of the principle, not only in the special question as to the "navigable river" clause, but by reference to another clause, in a very striking way:

"The 6th clause of the compact prohibits slavery. The constitution of the State also forbids it. Now, notwithstanding this inhibition in the constitution, the people of the State in convention might so alter the constitution as to admit slavery. But does not the compact prevent such alteration without the consent of the original States? * * * The provision of the compact in regard to slavery rests upon the same basis as that which regards navigable waters within the

State. They are both declared unalterable except by common consent." (*Id.*, 345.)

I have quoted this decision first because it was the decision of the United States court and made by one of the most eminent of the great magistrates who have sat upon this bench. But the same principle was decided by the supreme court of Ohio, some years earlier, in Hogg *vs.* The Zanesville Company, (5 Ohio, 410.)

By the authority of an act of the Ohio legislature the Zanesville Company erected a dam across the Muskingum, a navigable stream emptying through the Ohio into the Mississippi. The plaintiffs, in consequence of this obstruction, lost a boat loaded with freight for New Orleans and sued for damages. The defendants, among other things, set up in defence the acts of the Ohio legislature authorizing the dam. Judge Hitchcock, delivering the opinion of the court, says: "To the validity of these statutes as affording a protection to the defendants, the plaintiffs object on the ground that they interfere with the 'ordinance for the government of the Territory of the United States northwest of the Ohio.' The fourth article contains this clause: 'The navigable waters leading into the Mississippi and St. Lawrence and the carrying-places between the same shall be common highways, and forever free as well to the inhabitants of said Territory as to the citizens of the United States and those of any other State that may be admitted into the confederacy, without any tax duty, or impost therefor.' This portion of the ordinance of 1787 is as much obligatory upon the State of Ohio as our own constitution; in truth, it is more so; for the constitution may be altered by the people of the State, while this cannot be altered without the assent both of the people of this State and of the United States through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the State is not bound by compact this clause must be considered obligatory. Certain

'navigable rivers' in Ohio are 'common highways.' Of this character is the Muskingum river. Every citizen of the United States has a perfect right to its free navigation; a right derived not from the legislature of Ohio, but from a superior force. With this right the legislature cannot interfere; in other words, they cannot by any law which they may pass impede or obstruct the navigation of this river. That which they cannot do directly they cannot do indirectly. If they have not themselves the power to obstruct or impede the navigation, they cannot confer this favor upon an individual or a corporation."

There are three other cases to which I wish particularly to ask the attention of the court, and that for the reason that they have been relied on to sustain the opposite conclusion. In Woodburn *vs.* The Kilbourn Manufacturing Co., (1 Abbott, 158,) Mr. Justice Miller lays it down as decided law that the ordinance of 1787 is repealed, abrogated by the adoption of the Constitution, and refers to the cases I am now about to cite as the authority upon which he relies.

The language of Justice Miller is: "By the act of Congress admitting the new State, the several articles of the compact were not merely altered by the common consent required, but were superseded." Now, the court will observe that this proposition is not that the ordinance of 1787 was abrogated by the adoption of the Federal Constitution, but by adoption of the constitution of the State with the consent of Congress, in which proceeding both parties to the original compact joined; and there can be no dispute that the original parties to a compact can, by mutual consent, abrogate or modify it. But his Honor does go further, and adds, quoting from the opinion of Mr. Justice Daniels in the Dredd-Scott case, p. 490: "Whatever may have been the force accorded to the ordinance at the period of its enactment, its authority and effect ceased and yielded to the paramount authority of the Constitution of the United States from the time of its adoption."

The four cases upon which this dictum is rested are: Pollard *vs.* Hagan's Lessee, (3 Howard, 212;) Permolli *vs.* 1st Municipality, (3 Howard, 589;) Strader *vs.* Graham, (10 Howard, 82;) Dred Scott.

I submit that Pollard *vs.* Hagan did not raise the question. In it the question was as to the respective titles in certain lands, of the United States and the State of Alabama, which State never was a party to the original compact of the ordinance of 1787, and the only reference to the ordinance of 1787 connecting it with the case arose from the fact that by the cession of the territory out of which Alabama was erected, by Georgia, and by the conditions on which Alabama was first created a Territory and then admitted by act of Congress as a State, the same rights, advantages, and privileges—the article as to slavery excepted—which were secured to the inhabitants of the Northwestern Territory by the ordinance, were secured, by the act of Congress and the proceedings of the State convention to the citizens of Alabama; and the ordinance was referred to not as granting or securing these rights, but simply as describing what they were. In fact, that as far as the ordinance of 1787 was concerned, the case was precisely similar to Permolli *vs.* 1st Municipality, and the language of Mr. Justice Catron in the latter case applies directly to this.

In Permolli *vs.* 1st Municipality of New Orleans, (3 H., 589,) the case was this. A fine was imposed upon Catholic priests for performing certain services except in certain chapels, and it was contended that this was a violation of the article of the ordinance of 1787, guaranteeing freedom of religious worship, and extended to Louisiana by an act of Congress of 1805, providing, in the establishment of the territorial government of Orleans, that the inhabitants of the territory should enjoy all the rights, privileges, and advantages secured by the ordinance of 1787, and then enjoyed by the people of the Mississippi Territory.

It is clear that the question in this case was not as to the obligation of the ordinance of 1787 as a compact between the

original parties, viz., the United States on the one side and the inhabitants of the Northwest Territory on the other, but an altogether different question, viz., whether the United States, by an act of Congress, could extend to other parties—the inhabitants of the Orleans Territory—the advantages, rights, and privileges of the ordinance, so as to give these rights and privileges the force of contract obligation; whether, in fact, the United States, by legislation, could introduce other parties into this compact. The question was not at all as to the binding force of the compact between the original parties.

The court distinctly recognized the difference, and Justice Catron, in delivering the opinion of the court, says: "What the force of the ordinance of 1787 is north of the Ohio we do not pretend to say, as it is unnecessary for the purposes of this ~~court~~ case. But as regards the State of Louisiana, it had no further force, after the adoption of the State constitution, than other acts of Congress organizing in part the territorial government of Orleans, and standing in connection with the ordinance of 1787"

Nothing can be plainer. As between the people of the territory north of the Ohio and the United States the ordinance of 1787 was a compact. As between the people of the Territory of Orleans and the United States, it was simply the grant to them of similar privileges by an act of Congress. They derived them from and held them under, not the ordinance of 1787, but the act of 1805.

But the extent and meaning of these two cases are not matter of outside inference. The Supreme Court itself had these cases under review in reference to their bearing upon this very question.

In Strader *vs.* Graham, (10 Howard, 82,) the case was this: Certain slaves of Graham, a citizen of Kentucky, with their master's knowledge, went several times into Ohio, returning after each visit. Finally they went not to return, and did not return. He sued Strader, the owner of the steamboat in which they escaped. One of the defences was that they were

residents of Ohio, in which State slavery was forbidden by the ordinance of 1787.

The decision was that, as slavery was forbidden by the constitution of Ohio, to that extent being in conformity with the ordinance, it had superseded the ordinance by executing it, and that the question of slave or not slave was a question under the constitution of Ohio, not under the ordinance, and therefore not within the jurisdiction of the court.

But in delivering the opinion of the court, which on this point was unanimous, Ch. J. Taney said: "The argument assumes that the six articles which that ordinance (1787) declares to be perpetual are still in force in the States since formed within the territory and admitted into the Union. * * * If this proposition could be maintained it would not alter the question. * * * But it has been settled by judicial decision in this court that the ordinance is not in force," and he then refers to Permolli *vs.* 1st Municipality and Pollard *vs.* Hogan as so deciding.

But the court in agreeing to the decision that it had not jurisdiction did not accept this portion of Ch. J. Taney's opinion, but (some of the judges at least) protested against it with even more than usual emphasis. Mr. Justice McLean said: "The right to their freedom was asserted under the ordinance, which it is insisted brings the case within the 25th section of the judiciary act of 1789 and gives jurisdiction to this court.

"The provision of the ordinance in regard to slavery was incorporated into the constitution of Ohio, which received the sanction of Congress when the State was admitted into the Union. The constitution of the State, having thus received the consent of the original parties to the compact, must be considered in regard to the prohibition of slavery as substituted for the ordinance, and consequently all questions of freedom must arise under the constitution, and not under the ordinance.

"This, in my judgment, decides the question of jurisdiction

which is the only question before us; and anything that is said in the opinion of the court in relation to the ordinance beyond this is not in the case, and is consequently extra judicial."

And Mr. Justice Catron, agreeing in this view, said: "But in regard to parts of the other five articles, I am unwilling to express any opinion, as no part of either is in any degree involved in this controversy.

"The 4th article secured the free navigation of the waters leading into the rivers Mississippi and St. Lawrence and the carrying places between them as common highways, and exempted them from tax, impost, or duty. * * * For thirty years the State courts within the territory ceded by Virginia have held this part of the 4th article to be in force and binding on them respectively, and I feel unwilling to disturb this wholesome course of decision, which is so conservative to the rights of others, in a case where the 4th article is in no ways involved, and when our opinion might be disregarded by the State courts as *obiter*, and a dictum uncalled for. When the question arises here on the 4th article, it is desired by me that no such embarrassment should be imposed on this court as necessarily must be by now passing judgment on the force of the 4th article, and pronouncing that it stand superseded and annulled."

If, then, I am right in supposing that Pollard *vs.* Hogan and Permolli *vs.* 1st Municipality did not involve, and therefore could not decide, the validity of the ordinance of 1787 as a compact between the original parties; if I am right in supposing that the language of the judges in Strader *vs.* Graham was intended to guard these cases against this very construction, then there only remains the Dred Scott case as authority for the dictum. I would remark that the language cited in the circuit court decision, and which I have just read, is not the language of the decision, but the language of one judge, Mr. Justice Daniels, giving the reasons for his concurrence; and even if acquiesced in silently by his colleagues,

could scarcely be considered the authority of the court. But this opinion was not acquiesced in.

I do not mean to discuss the Dred Scott case. But this is certain, that the validity of the ordinance of 1787 was not and could not be involved in that case. The way in which it came to be referred to at all was this: In undertaking to pronounce the Missouri Compromise act of 1820 unconstitutional the court was obliged to discuss the powers of Congress over the Territories; that led to a discussion of the history of Congressional legislation, in which the ordinance of 1787 was referred to by several of the judges; and in relation to it they expressed very various opinions, the opinion of Mr. Justice Daniels being very much the most absolute in that direction. But the ordinance itself never was in question. Three points decided were: 1. That Scott, being of African descent, could not be "a citizen of the United States," and could not, therefore, sue in the court below. 2. That the question of his freedom was to be decided by the law of Missouri, not the law of Illinois. 3. That the Missouri Compromise was unconstitutional. ~~Neither Missouri nor Illinois were within the Northwest Territory, and~~ The ordinance of 1787 had nothing to do with the act of Congress of 1820.

Chief-Justice Taney did, however, in this case as he did in Strader *vs.* Graham—express an opinion on the ordinance of 1787. And I ask attention to that opinion. Referring to the cession by Virginia and other States of their public lands, he says:

"Undoubtedly the powers of sovereignty and the eminent domain were ceded with the land. This was essential in order to make it effectual and to accomplish its objects. But it must be remembered that at that time there was no Government of the United States in existence, with enumerated and limited powers. What was then called the United States were thirteen separate, sovereign, independent States, which had entered into a league or confederation for their mutual protection and advantage.

* * * * * * *

"But this confederation had none of the attributes of sovereignty in legislative, executive, or judicial power. It was little more than a congress of ambassadors, authorized to represent separate nations in matters in which they had a common concern. It was this Congress that accepted the cession from Virginia. They had no power to accept it under the Articles of Confederation. But they had an undoubted right, as independent sovereignties, to accept any cession of territory for their common benefit which all of them assented to. And it is equally clear that, as their common property, and having no superior to control them, they had the right to exercise absolute dominion over it, subject only to the restrictions which Virginia had imposed in her act of cession. * * The territory belonged to sovereignties, who, subject to the limitations above mentioned, had a right to establish any form of government they pleased, by compact or treaty among themselves, and to regulate rights of persons and rights of property in the territory, as they might deem proper. It was by a Congress representing the authority of these several and separate sovereignties, and acting under their authority and command, (but not from any authority derived from the Articles of Confederation,) that the instrument called the ordinance of 1787 was adopted."

Mr. Justice Campbell, holding apparently very much the same view, says:

"It was conceded in the argument that the authority of Congress was not adequate to the enactment of the ordinance, and that it cannot be supported upon the Articles of Confederation. * * * The consent of all the States represented in Congress, the consent of the legislature of Virginia, the consent of the inhabitants of the Territory, all concur to support the authority of this enactment. It is apparent in the frame of the Constitution that the convention recognized its validity, and adjusted parts of their work with reference to it."

Now, these three opinions differ both in themselves and their consequences, but it would carry me too far from the case in hand to discuss them. But putting aside for the moment the consideration that the point involved in the opinions is not involved in the case, and that the opinions so far, there-

fore, are *obiter*, let us look for a moment at the doctrine. The court understands that my whole object in dwelling upon this ordinance of 1787 is to show that the courts have held a compact made before the Constitution between the States as binding and valid after the adoption of the Constitution, and not abrogated or changed in essentials by it, and to insist upon such decision as a precedent governing the Treaty of Beaufort of 1787.

Let me suppose, then, that the view of Ch. J. Taney and Justice Campbell is correct—that the Confederation was only a league of thirteen original sovereignties, represented in Congress by their ambassadors; who, then, were the parties to the compact of 1787, which both the judges admit the ordinance to be as far as the six articles are concerned? The thirteen original sovereignties on the one side and the inhabitants of the Northwestern Territory on the other. Who adopted the Constitution? The thirteen original sovereignties. But did the inhabitants of the Territory adopt the Constitution; were they allowed to hold a convention as each State and vote for or against it? Not at all. Then, by this argument, the original thirteen States, one party to the compact, by adopting the Constitution without the consent of the other party, destroy the compact.

Again: This view can only strengthen the character of the compact of 1787 and the Treaty of Beaufort; for if under the Confederacy there was no embryo of national existence, if there were only thirteen sovereignties represented by ambassadors, then the cession of territory by Virginia in 1784 and by South Carolina in 1787 was a cession to that league of confederate States, and to no other political society. When the league ceased to exist, as Chief-Justice Taney maintains it did cease to exist at the adoption of the Constitution, by what process of transfer did this territory pass from the extinct league to the new nation? Virginia and South Carolina did not cede their territory to a "United States" which was not in existence, nor did they cede territory to Massachu-

setts, New York, and Pennsylvania as individual and independent States. They ceded their territory to a union of States of some kind, where that very relation, whatever it was, was the inducing cause of the cession; and unless there was some continuity of political existence carrying that cession into the life under the Constitution, it is impossible to trace the chain of title.

But much stronger is the case of the Treaty of Beaufort, for that treaty created the territorial limits of two of these sovereignties, and made them, as to limits—a very essential element in their sovereign existence—what they were when they adopted the Constitution, and at the dissolution of the league they were sovereignties bound by this treaty, and could enter the new life under the Constitution only as bound by the conditions of the treaty which, as sovereigns, they had executed.

I refer your honors to another series of cases referring to compacts made since the Constitution, with the consent of Congress, but of which I will only ask your attention to Greene *vs.* Biddle, (8 Wheaton, 1,) in which the court says: "The compact between Virginia and Kentucky was a contract within the 18th section of Ar. 1 of the Constitution of the United States.

"It is not necessary that the consent of Congress to a compact between two States should be expressed in any particular form; and when Congress consented to the separation of Kentucky and its erection into a State, it must be taken to have consented to the compact by which the separation was agreed to be made.

"It is not a valid objection to the compact that it restricts the exercise of the legislative power of Kentucky in certain particulars."

If this be so, was not the submissal of the Constitution to Georgia and South Carolina a recognition of them as they existed under the treaty which fixed their boundaries and ascertained to that extent their population? And still more

clearly, was not the acceptance in 1802 of the cession by Georgia of lands acquired in part under the Treaty of Beaufort a consent to that compact?

I submit that the cases which I have read establish the principle that treaties and compacts made either by the States in confederation or by the States between themselves, before the adoption of the Constitution, are of lasting obligation, and binding upon the parties until abrogated or modified by their mutual consent; and that even where it has been held that the ordinance of 1787 was abrogated, it was so held on the express ground that the abrogation was the work of the original parties to the compact, the State signifying its consent by the adoption of the State constitution, and the United States signifying its consent by agreeing thereto, and that in each case the constitution was in conformity with the terms of the compact.

And I refer to Howard *vs.* Ingersoll, 13 How., 405, in which will be found an interesting and elaborate history of this very treaty, by Mr. Justice Wayne, to show l[illegible]bso-lutely it was incorporated into the history and ex[illegible] the States who were parties to it, and effected the[illegible] rial rights and interests, as ascertained by judicia[illegible] long after the adoption of the constitution.

But not only is the principle of the validity of this treaty and therefore its continuing obligation recognized by the judicial authority of the United States, but what in a case like this is perhaps of equal importance, this character of the treaty has also been recognized by the political authority of the country.

As I have called to the attention of the court, South Carolina, immediately upon the execution of this treaty and its ratification by the Congress of the Confederacy, ceded the United States her western territory beyond the Tugaloo acquired and secured by this treaty. Owing to some error in the surveys there appears to have been a tract of land in this territory which was not included within the State lines of

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And I refer to Howard *vs.* Ingersoll, 13 How., 405, in which will be found an interesting and elaborate history of this very treaty, by Mr. Justice Wayne, to show how absolutely it was incorporated into the history and existence of the States who were parties to it, and effected ~~there~~ territorial rights and interests, as ascertained by judicial decision long after the adoption of the constitution.

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either Georgia, North Carolina, or South Carolina, and the inhabitants petitioned Congress to put them under some government, and in April, 1800, the House of Representatives recommended that it should be retroceded to the State of South Carolina.

American State Papers, Public Lands, vol. i, p. 103.

In 1802 Georgia ceded her western territory to the United States, and Congress accepted the cession, the boundaries of this cession being in part determined by the Treaty of Beaufort: and afterwards Alabama, created out of this territory, was admitted as a State.

How is it possible that this legislation could have been proposed or accomplished, this cession accepted, this new State created, without accepting as muniments of title and part of the cession, the treaty which perfected the title received from Georgia and South Carolina? And if this treaty contained conditions upon which it depended, these conditions were confirmed when the treaty was accepted. If the cession of territory by South Carolina to Georgia was made in exchange for and as a condition of the perpetual freedom of the Savannah river from any "toll, duty, interruption, hindrance, or molestation whatever," when the United States, in 1800 and 1802, after the adoption of the Federal Constitution, accepted the land so acquired by Georgia and South Carolina, did they not accept and confirm all the conditions upon which the land was obtained by their grantors, and all the obligations by which that territory was bound in their hands?

But the Government—the political authority of the United States—has gone further. It has distinctly, not by inference, recognized the binding nature of this treaty in reference to this very navigation of the Savannah river. In 1835, the annual report of the Engineer Department to Hon. Lewis Cass, Secretary of War, contains this statement: "The progress of the improvements on this river has not answered

the expectations of the project for the year, or the anticipations contained in my last report.

"It was contemplated to complete the foundation of a permanent obstruction between Hutchinson and Argyle Islands, and to remove, by dredging, the shoals at the wrecks, Garden Bank and Upper Mud Flat. All the preliminary arrangements for the first-mentioned object were made, materials were collected and operations commenced, when the local engineer was made aware that, by the second article of the Treaty of Beaufort, concluded in 1787 between the States of Georgia and South Carolina, no obstructions whatever should be made by the citizens of either State in the channel it was contemplated to close. A suspension of operations was therefore required by the Department, the subject was referred to the United States attorneys in those States, and a consequent application will be made to the respective Governors at the suitable time."

President's Message, Dec. 8, 1835. Senate Doc. 1, 1835, 1836, page 108.

In 1838, Captain Mansfield, the officer in charge, reports to Colonel Gratiot, the head of the Engineering Department, and after stating what had been done in 1833 and 1834, says: "In the year ending September, 1835, the obstruction contemplated between Hutchinson and Argyle Islands was commenced, and some material collected for its prosecution, when it was ordered by the Department to be suspended in consequence of the second article of the Treaty of Beaufort, concluded in 1787 between the States of South Carolina and Georgia. For particulars on this subject reference is respectfully made to the annual report of 1835.

"The year ending 30th September, 1836, application was made to the States of South Carolina and Georgia for authority to proceed with the contemplated obstruction between Hutchinson's and Argyle Islands, which resulted in the full grant of authority on the part of Georgia and a contingent

grant on the part of South Carolina, the latter referring the matter to three commissioners, who did not succeed at the time appointed to meet together."

Then, stating what had been done in 1837 and 1838, he adds:

"Relative to the contemplated obstruction between Hutchinson's and Argyle Islands, as the principal feature and key to the plan for the improvement of this navigation from the city, and the only one that would insure a permanent improvement, the undersigned regrets to be obliged to state that the commissioners on the part of the State of South Carolina have decided against granting the authority to proceed with the same." (See Letter B, from D. E. Huger, Esq., hereunto appended.)

"After such a decision by the commissioners, it is clear that nothing can be done for the permanent improvement of this river from the city of Savannah to its mouth."

[Letter B.]

SAVANNAH, 1 *May*, 1838.

DEAR SIR: In conformity to your request I hasten to communicate the conclusion at which the commissioners have arrived.

It is that you are not to be permitted to proceed a foot in obstructing the main channel of the Savannah river.

This determination causes me great regret, as I cannot but think it at variance with the courtesy due to the State of Georgia. I have only to add my best respects.

Yrs.,

D. E. HUGER.

—— MANSFIELD.

Manuscript files Engineer Bureau War Department.

In 1839, Captain Mackay, the engineer in charge, reporting to Col. Abert, says:

"The plan formerly proposed by some of the citizens of Savannah, and afterwards by Captain Mansfield, of the engineer corps, when he took charge of the river improvement, of making a dam across the channel from Argyle to Hutch-

inson's Island, was objected to on the part of some individuals, who were authorized to do so by the State of South Carolina under a former treaty entered into between the States of South Carolina and Georgia, in the year 1787.

"The plan I propose I do not conceive can injure any individual or public interest, nor can any one object to it under any law or treaty."

President's Message, Feb., 1840, Doc. 2.

And he recommends a series of piers between Argyle and Hutchinson's Island, a broken dam instead of a continuous one, which plan was not adopted.

Ten years afterwards another report was made by Captain Crawford, of the engineers, in which he says:

"It was first proposed to place an obstruction between Argyle and Hutchinson's Island along the line K K. This was objected to by South Carolina, whose consent it was necessary to obtain."

He then recommends a plan of running out dikes from the upper and from the lower end of Hutchinson's Island, and adds:

"An uninterrupted navigation through that passage being maintained, the question of jurisdiction, it is not probable, could arise, as the work would be wholly within the limits of Georgia.

President's Message, Jan. 28, 1850, Ex. Doc. 19.

In 1853, a commission, composed of Professor Bache, Capt. Bowman, and Lieut. Gilmore, reported, by order of the War Department, a plan which abandoned altogether the idea of an obstruction between Hutchinson and Argyle Islands, and confined its operations to Front river.

Annual report of Major Gilmore, 1873, pp. 16, 17.

In 1853 and 1854, in 1856 and 1857, work was executed in accordance with this plan, and a channel of 17½ feet was dredged through the bar where the wrecks had been em-

bedded, without interfering at all with the terms of the treaty. *Idem.*

No further effort was made until after the close of the war, when, upon a resurvey of the Savannah river and harbor in 1873, General Gilmore recommended the present obstruction.

Take in connection with this construction of its powers by the War Department, the language of the acts under which this improvement was authorized.

1829. For removing obstructions in the Savannah river, below the city of Savannah, in Georgia, $24,490.

1834. For improving the navigation of the river Savannah, in removing the obstructions in said river, from the city of Savannah to its mouth, $30,000.

1838. For the improvement of the navigation of Savannah river, Georgia, $15,000.

1852. For the removal of obstructions in the Savannah river at a place called the wrecks, and the improvement of the navigation of said river, $40,000.

1852. That the Secretary of War cause to be examined and surveyed the rivers Savannah from the city of Savannah as high up as the city of Augusta, and to report to Congress the amount of money which may remove any obstructions to navigation, and that the sum of $10,000 be appropriated for that purpose.

1855. That the sum of one hundred and sixty-one thousand dollars be appropriated to remove the obstructions in the Savannah river below the city of Savannah, in the State of Georgia, placed there during the Revolutionary war, for the common defence.

1856. Appropriation of unexpended balance of appropriation of 1855, under the direction of the Secretary of War, to remove the bars, shoals, banks, and other impediments in said river caused by said obstructions, as proposed in the project of the commissioners appointed by the War Department, July, 1853.

1871. Survey "at Savannah harbor, Georgia."

1872. For the improvement of Savannah river and harbor, Georgia, $50,000

1873. For the improvement of Savannah river and harbor, $50,000.

1874. For continuing the improvement of the harbor at Savannah, Georgia, $50,000.
1875. For the improvement of the harbor at Savannah, Georgia, $70,000.
1876. For the improvement of the harbor at Savannah, Georgia, $62,000.

Throughout all this legislation there is but one object, the removal of obstructions, and but one locality, "Savannah harbor and river, Georgia. Legislation not only perfectly consistent with but apparently in direct obedience to the provisions of the treaty which forbade the erection of any obstruction in the main channel, but did not forbid any such work in the Georgia branch of the river.

Up, then, to this time, a half century from the first appropriation in 1826, with thorough consideration of the subject, the War Department, the Executive Department charged with the administration of the law for river and harbor improvement, it is evident from these reports, held that the treaty of 1787 was valid, and its obligations existing; and that, without the consent of South Carolina, there could be in the main channel of the Savannah river no "interruption, hindrance, or molestation whatever." And their object was, by repeated effort, to devise a scheme which would deepen the channel before the city of Savannah without doing violence to the terms and conditions of the treaty of 1787.

I have thus endeavored to show that the terms of the Treaty of Beaufort are perpetual; that it was executed by States competent to deal with their own territory and to control their own future; that nothing in the Federal Constitution abrogates or gives power to the Federal Government to abrogate it; and that it is, therefore, to-day a law binding not only upon the States who signed, but controlling the action of the agents of the Federal Government.

I further submit that this interpretation of the law denies no power granted under the onstitution. It does not deny the power to regulate commerce; it does not deny the im-

plied power of improving rivers and harbors. It simply claims that, by special law, by a treaty older than the Constitution, the Savannah river has been exempted from the interference of this general power, and the Federal Government is bound to maintain it in that condition in which it was brought into the Union by the States to whom it belonged.

Further, that it is a very serious question how far the power to regulate commerce, carrying with it the right to improve navigation, can be considered as authorizing the Government of the United States to *obstruct* navigation; how far the right to keep open navigable streams, and to prevent and punish their obstruction, authorizes the United States Government to *destroy* a navigable stream.

In Gilman *vs.* Philadelphia, (3 Wallace, 725,) Mr. Justice Swayne says: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they deem proper, against the occurrence of the evil and the punishment of the offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the Constitution, and which have always existed in the Parliament of England."

In all this clear and full enumeration of powers resulting from the power to regulate commerce—their object and purpose are uniform—are "to keep them [the navigable waters] open and free from any obstruction to their navigation or otherwise." Nowhere is there any reference to any power to create obstructions, to repeal "a navigable river" by Congressional legislation. No; the obligation, the whole obliga-

tion, is to preserve open and free those waters which God has made navigable, and to prevent any interference with them by the selfish interest of any one State.

Place this description of the power to regulate commerce in connection with section 9, Article I, of the Constitution: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

If the improvement of rivers and harbors is, as this decision pronounces, "a regulation of commerce," then this section is equivalent to, is in fact a declaration, that "no preference shall be given by any river or harbor improvement to the ports of one State over another," and by no such improvement "shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another."

Now turn to the answer of the defendants. What is the nature and purpose of this obstruction? After describing the two channels, Front and Back river, it says: "Of these channels the more northerly is known as Back river, whilst that which passes immediately by the city of Savannah is called Front river. Two-thirds (or 16,000 feet per second) of so much of the Savannah river as flows to the upper end of Hutchinson's Island passes through cross-tides (mentioned in the bill of complaint) into Back river, whilst only one-third (or 8,000 cubic feet per second) passes into Front river and by the city. In the meanwhile the available depth of the two streams is much the same. * * * The improvement of the approach by water to Savannah has been an object of national concern and legislation since 1828–9. * * * The present design of the officers of the United States in charge of the improvement of the harbor of Savannah is to give to that city the advantage of a depth of fifteen feet at low water, with the hope of increasing that hereafter to seventeen feet. * * * The defendant Q. A. Gilmore, in his annual report of August 28, 1873, to the defendant A.

A. Humphreys, as Chief of Engineers, &c., with a view of providing for an increase in the flow of water in Front river, and so of enlarging its water-way and also its scouring effects at points lower down, recommended "that the cross-tides water may be closed to the level of ordinary half or three-quarters tide by the construction of a sub-dam across the stream at its narrowest point, where it is only about 640 feet in width. The results produced may indicate that a higher dam would be still more advantageous, in which case it should be raised to the level, perhaps, of ordinary high water, beyond which it would be injudicious to carry it. For the accommodation of the small boats and flats ordinarily using this channel to reach the plantations on the South Carolina shore, the crib-work at mid-channel should be kept five to six feet below ordinary high-water level for a distance of fifty to sixty feet. This would afford ample channel-way for the small river craft—such as canoes, row-boats, scows, and small sail-boats—accustomed to pass and repass through the cross tides. Vessels of a larger draught than four or five feet rarely have occasion to use the upper portions of Back river at all, and when required to do so can enter at the 'Wrecks.'"

Putting the Treaty of Beaufort aside, what is this but a violation of the "power to regulate commerce," properly interpreted, inasmuch as it is the obstruction of a navigable river, and not its improvement; the closing of the Savannah river as created by nature and law, and substituting in its stead by forced and artificial contrivance one of its own secondary and inferior branches?

What is it but a violation of the section of the Constitution which forbids a preference of the ports of one State, by deepening the harbor of Savannah at the expense of the navigation of South Carolina, by literally taking away the water upon which the produce of one State is carried to increase the volume and deepen the channel of the waters of another State?

What is it but a violation of the section of the Constitution which declares that "vessels bound to or from one State" shall not "be obliged to enter, clear, or pay duties in another," by compelling vessels of five or six feet draught bound to the upper portion of Back river to abandon the South Carolina channel, and make their way through the waters of Georgia into the State to which they are bound?

There remains, then, only the question whether the State of South Carolina has sought the appropriate remedy in the proper way.

I have occupied so much of the time of the court that I shall leave the discussion of this question to the fuller knowledge and larger ability of the distinguished counsel with whom I have the honor to be associated.

I will only say in conclusion that if the Constitution has given to this court original jurisdiction in all cases in which a State shall be a party, I can imagine no case in which a State is so essentially and necessarily a party, and in which her rights, clearly rights of property, as distinguished from political rights, are better entitled to protection, nor one in which her own direct interests and duty to her citizens more absolutely compel her to assert and maintain these rights; and from 1799, when in a controversy between New York and Connecticut, Mr. Justice Washington used this language—"I will not say that a State could sue at law for such an incorporeal right as that of sovereignty and jurisdiction. But even if a court of law would not afford a remedy, I can see no reason why a remedy should not be obtained in a court of equity. The State of New York might, I think, file a bill in equity against the State of Connecticut, praying to be quieted as to the boundaries of the disputed territory; and this court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries. There being no redress at law would be a sufficient reason for the interposition of the equitable powers of the court, since it is monstrous to talk of existing rights without applying correspondent reme-

dies," (Fowler *vs.* Lindsey)—to the case of Pollard *vs.* Hagan, (3 Howard,) in 1844, when Mr. Justice Catron said: "I admit if the agents of the United States obstruct navigation, the State authorities may remove the obstruction and punish the offenders," and thence to this day I know of no decision of this court which has placed new limitations upon either the rights of the States or the power of this Supreme Tribunal.

W. H. Trescot
of Counsel for Complt.

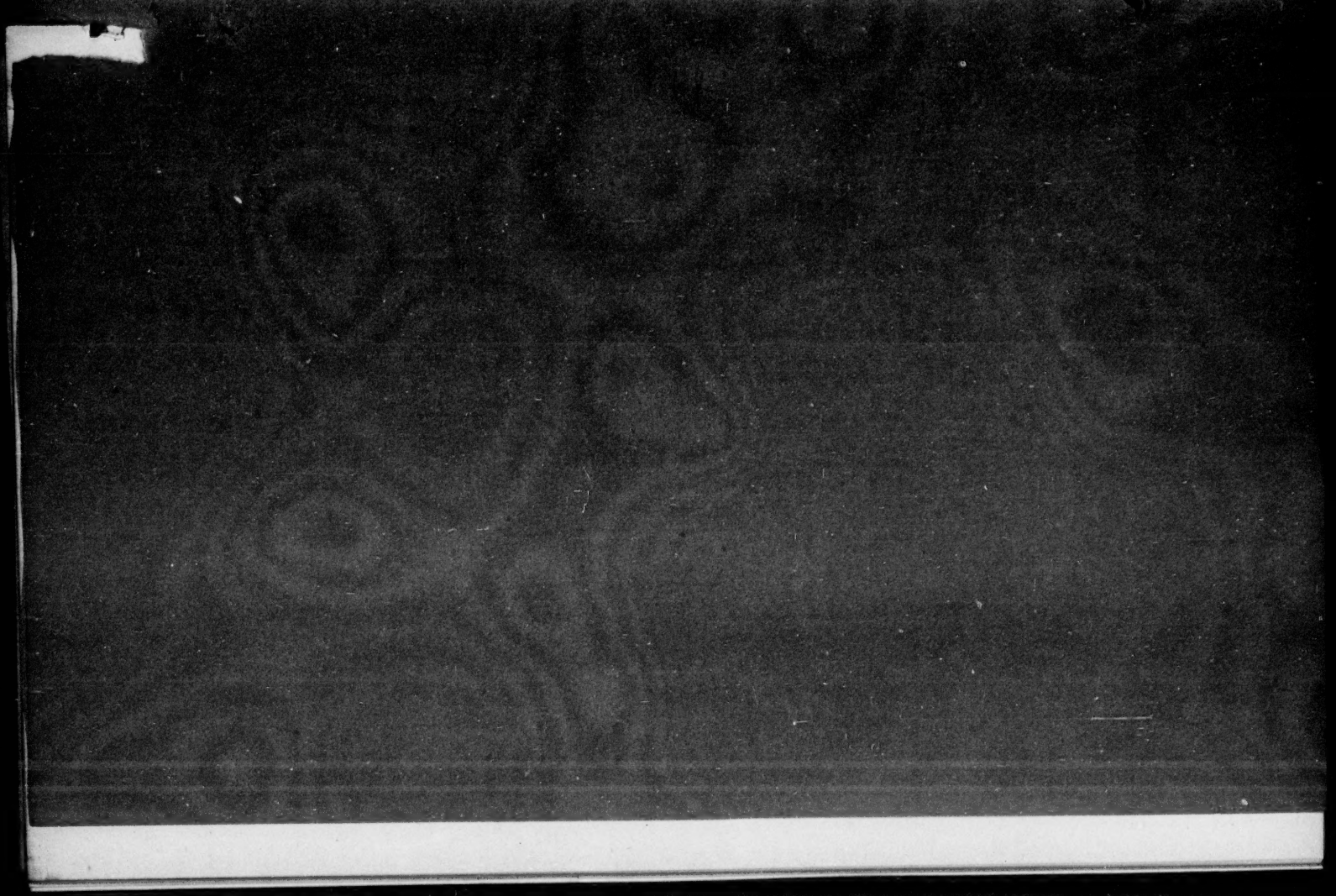
In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE STATE OF SOUTH CAROLINA
versus
THE STATE OF GEORGIA, ALPHONSO TAFT, SECRETARY OF WAR OF THE UNITED STATES; A. A. HUMPHREYS, BRIGADIER-GENERAL AND CHIEF OF ENGINEERS, U. S. A., AND Q. A. GILLMORE, LIEUTENANT-COLONEL OF ENGINEERS, U. S. A.

Bill for an injunction.

Brief for the United States.



In the Supreme Court of the United States.

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Bill for an injunction.

BRIEF FOR THE UNITED STATES.

The case made by the bill is that, in 1788, the States of South Carolina and Georgia, by proceedings under *the Articles of Confederation*, agreed upon a *boundary* between them along the Savannah River, and also upon the *free navigation* of that river in a specified channel, by their citizens respectively. It shows that in regard to a part of the river near its mouth, where it is divided by Argyle Island, the boundary-line and the line of navigation separate; elsewhere, so far as the river continues navigable, they coincide; that the *boundary*-line runs to the *north* of Argyle Island, that of *navigation* to its *south;* and that this agreement has been faithfully kept until

February last, at which time the defendants other than the State of Georgia,

"And their subordinates, &c., under their control and direction, as officers of the Government of the United States, professing and claiming to be acting and directing the same under the orders of the War Department of the General Government of the United States, but, as your orator believes and alleges, at the instance, request, and procurement of the State of Georgia, or of citizens thereof, commenced placing obstructions in the main channel of the said Savannah River where the said channel runs between Hutchinson's and Argyle Islands, (that is, south of the latter,) avowedly for the purpose of closing the said channel and diverting the main stream out of its usual and natural course, and the course recognized and stipulated for, and so as greatly to interrupt the navigation thereof, even at this present time, so as to prevent the use of it by the citizens of the State of South Carolina, altogether and entirely * * * to the great and irreparable injury and damage of all the said citizens of South Carolina having occasion, at any time, to use and navigate the said river, and more especially to the great damage and injury of the said citizens of South Carolina owning lands upon said river near to the said Hutchinson's and Argyle Islands, and the destruction of all their riparian rights, &c."

That the complainant had applied to said defendants to forbear, but that they pretend to be

"Acting in pursuance of lawful authority, to wit, in pursuance of the authority of the Government of the United States, whereas your orator charges that no Department of the Government of the United States has any right or authority to direct or permit the defendants, claiming to act by its authority, to obstruct and interrupt the navigation of the said river, guaranteed as aforesaid to the citizens of the State of South Carolina."

Thereupon the bill prays as relief, "that *the said defendants may be restrained and enjoined from further obstructing and interrupting the navigation of the said river.*" There is no general, and no other special prayer for relief.

This bill, *whose scope, like that of all others, is defined by the prayer for relief*, therefore proceeds upon the

ground of an obstruction of the *navigation* of the Savannah. The allusion to *boundary* is merely by the by; and the matter of the *riparian rights* of citizens of South Carolina is alluded to only in connection with their *special rights of navigation*, and *not*, as is suggested by affidavits on file, also to *their rights as cultivators of rice*, &c., in plantations on the bank of the river.

Before considering the graver portions of this proceeding, I notice that the only persons to whom rights of navigation are guaranteed by the agreement of 1788 are the *citizens* of South Carolina and Georgia, not the States themselves; and accordingly the bill alleges no such right in the complainant itself.

In point of fact, then, the State of South Carolina, (which indeed makes no claim here of any right of navigation peculiar to itself, and does not allege that in a private capacity it owns lands or other property on the banks of the Savannah, or that it has any water-craft or merchandise floating thereon,) files this bill merely to vindicate certain alleged private rights of its citizens.

This seems to be a fatal error.

When a State brings suit in a court of the United States, *it appears in its private capacity.*

In Pennsylvania *v.* The Wheeling Bridge, (13 Howard, 518,) where the State sought to enjoin a certain obstruction to the navigation of the Ohio, this court said:

> In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a State are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the State prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power

of this court can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained.

When a State enters into a copartnership, or becomes a stockholder in a bank or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners. And so in the present case, the rights asserted and relief prayed are considered as in no respect different from those of an individual. From the dignity of the State, the Constitution gives to it the right to bring an original suit in this court. And this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case.

It follows that South Carolina has in this connection no other *privilege* than that of bringing its suit in this court. *Its sovereignty* is *not involved in the business, but it stands and is treated as other litigants.*

Consequently, the case of the City of Georgetown *vs.* The Alexandria Canal Company (11 Peters, 91) is in point. There the complainant sought, in behalf of itself and its citizens, to enjoin the building of the Aqueduct Bridge, (as it is called,) as being an obstruction to the navigation of the Potomac, which navigation it alleged (very much as in the case here) had been secured by compact between Virginia and Maryland, made in 1785.

After saying that an obstruction of a navigable river is a *public* nuisance, for which a private action cannot be maintained except by some person specially damaged, the court proceeds:

With this principle as our guide, let us now examine the pretensions of the appellants in this case. Who are they? Not, indeed, a private person, but a corporation. They profess to come into court for themselves and for the citizens of Georgetown. Now, it is not even pretended that, in their character of a corporation only, they have any power or authority given to them by their charter to take care

of, protect, and vindicate in a court of justice the rights of the citizens of the town in the enjoyment of their property, or in removing or preventing any annoyance to it. Nor does such a power attach to them in their corporate character upon any principle of the law in relation to corporations. The complainants, then, must, as in the case of private persons, to maintain their position in a court of equity for relief against a public nuisance, have averred and proved that they were the owners of property liable to be affected by the nuisance, and that in point of fact were so affected, so as that they thereby had suffered a special damage. Now, there is no such averment in this bill. The appellants seem to have proceeded on the idea that it appertained to them, as the corporate authority in Georgetown, to take care of and protect the interests of the citizens. In this idea we think they were in error; and that they cannot, upon any principle of law, be recognized as parties competent in court to represent the interests of the citizens of Georgetown.

There is neither right nor need for South Carolina to sue on behalf of its citizens in a court of the United States. Their rights will receive the same measure of protection from the latter as from the former, and the United States cannot admit the existence of a *prochein ami* in such a case. An agreement like that of 1787 can at this time of day confer no rights upon the citizens of South Carolina to navigate the Savannah, inasmuch as such rights are otherwise, *under the Constitution of the United States*, *perfect*, and cannot be more than that with an addition of such agreement.

I will now proceed to another view of this case.

I suppose that there can be no doubt of the right of the State of Georgia or of any of its citizens to apply to Congress for any redress of grievance *within the jurisdiction of the latter.*

It cannot be pretended that, if the "United States"

had never been formed, Georgia might not properly have *procured South Carolina* to consent to a change of the navigable channel designated in 1788. If so, the fact that South Carolina in 1789 assigned to the United States all of its right to regulate that channel constitutes the United States the proper party to receive such application. The truth is that, by becoming members of the Union, South Carolina and Georgia stripped themselves contingently of all power over that part of the agreement of 1788 which stipulates for navigation. This contingency has happened; for, so soon as the United States undertook to regulate that navigation, both States became *excluded* (12 How., 299; 3 Wall, 713; 6 Wall., 35) from interference therewith; so that whether the terms of that agreement so far are to be kept or not is no matter of legal interest to either party, or to both parties acting together.

However, upon this part of the case it will be seen that all of the defendants answer that there has been no intervention of the sort charged in the bill, either by Georgia or by its citizens, although *how any such intervention by citizens of Georgia would give a right to make the State a defendant*, if otherwise practically important here, may need explanation.

Leaving these partial considerations of the case, I bobserve that the ill really denies to the United States the power of regulating the navigation of the *Savannah* otherwise than as provided by the agreement of 1788.

The case shows such interference by the United States, and as this appears *from public law and public documents*, it is probable that the complainant knew the question

which it had to meet, and has acted deliberately in so stating its contention.

As is well known, it is a part of the system of national improvements by the United States to require reports to Congress from the Engineer Department of the Army, through the Secretary of War, in regard at least to the principal points of that system. In general the Secretary reports to Congress the recommendations of the engineers as to the details of the works contemplated, and thereupon Congress makes an appropriation in the usual formula contained in the first section of such acts, "*to be expended under the direction of the Secretary.*" Such *directions* it is supposed will conform to the reports already submitted, and to this extent, at all events, become directions *by Congress*, just as *regulations* in the Treasury, &c., when authorized by Congress, become its own regulations. (See United States *vs.* Du Luth, 1 Dillon, 469; Abraham *vs.* The Great Northern, 16 Q. B., 586.)

The following contains so much of the reports made to Congress in regard to the *improvement* of the river and harbor of Savannah, as indicates what were the directions which Congress authorized in its various appropriations for that purpose.

In the annual report upon the Improvement of Rivers and Harbors on the coast of Georgia, &c., of October 20, 1873, which is mainly the work of General Gillmore, Engineer in charge, but is indorsed by General Humphreys, Engineer-in-chief, (and is on file in this case,) may be found, beginning at page 13, an elaborate project for the improvement of Savannah harbor and river.

It is there said that this work under the Chief of Engineers, after an interruption for several years beginning before the late civil war, had been resumed during

the fiscal year ending June 30, 1873, being accompanied by a *resurvey* of "Savannah Harbor," (as ordered by the act of June 10, 1872, section 2; 17 Stat., 376,) including Cross-Tides, (p. 30.)

In the course of a sketch of the history and hydrography of the harbor, it is further said (page 16) that "a plan formerly advocated by some of the citizens of Savannah, and subsequently (forty years since?) by Lieutenant Mansfield of the Corps of Engineers, to construct a dam across the Cross-Tides, between Hutchinson's and Argyle Islands, was opposed by the State of South Carolina, and thereupon abandoned."

After discussing various proposals, theretofore more or less favored and to some extent adopted, for increasing the water-way from the ocean to Savannah City, especially a new jetty at Cross-Tides, General Gillmore says, (Report, 1873, p. 20:)

> But I do not consider the construction of this new jetty and the whole or partial removal of the old one as the best solution of the problem here presented, although it would doubtless result in immediate and permanent benefit. It would be far better to close the Cross-Tides Channel in the manner described below.
>
> Instead of the deflecting jetty above described, I recommend that the Cross-Tides water-way be closed to the level of ordinary half or three-quarter tide by the construction of a crib-dam across the stream at its narrowest point, where it is only about 640 feet in width. The results produced may indicate that a higher dam would be still more advantageous, in which case it should be raised to the level, perhaps, of ordinary high water, beyond which it would be injudicious to carry it.
>
> For the accommodation of the small boats and flats ordinarily using this channel to reach the plantations on the South Carolina shore, the crib-work at midchannel should be kept 5 to 6 feet below ordinary high-water level for a distance of 50 to 60 feet. This would afford ample channel-way for the small river-craft, such as canoes, row-boats, scows, and small sail-boats, accustomed to pass and repass through the Cross-Tides. Vessels of a larger draught

than 4 or 5 feet rarely have occasion to use the upper portions of Back River at all, and when required to do so can enter at the "Wrecks."

I estimate the entire cost of this crib-dam at $29,500, or $46 per linear foot, and, in my judgment, the increased flow in Front River and the greater scouring effect secured by its construction will effect a saving of much more than this amount in the aggregate cost of dredging at points lower down.

Previous plans for the erection of a dam across the Cross-Tides water-way have contemplated the entire stoppage of flow in this direction, and have been frustrated by the not unreasonable opposition of the authorities of the State of South Carolina.

As the project now proposed makes ample provision for carrying on the ordinary trade and commerce of the locality, and as Back River throughout its entire length is at all times and tides available for such vessels as in rare and exceptional cases cannot pass over the proposed dam at high water, I can conceive of no well-grounded objection that can be urged against its construction.

Opposition instigated by motives of rivalry should have no weight in deciding questions involved in the improvement of a great national thoroughfare like the Savannah River.

My preference for the dam instead of the deflecting jetty amounts to a positive conviction that it is by far the best, as well as the least costly, improvement of the two.

The report concludes as follows:

The following estimate, it is believed, will cover all necessary items of expense to be incurred in establishing a convenient and permanent channel from Tybee Roads to the city of Savannah, practicable, at high tide, for vessels drawing 22 feet of water.

* * * * * * *

The estimate provides for a dam at Cross-Tides, for widening the water-way opposite the city front, and for deepening, widening, and straightening the channel by dredging at various points between the city and Tybee Roads.

* * * * * * *

1. For closing Cross-Tides by a crib-dam, with opening for small vessels protected by riprap apron	$29,500
2. For enlarging water-way opposite city front to an average of 575 feet by 15 feet, not including cost of new bulk-head	85,500

3. For dredging at "Knoll" for channel 300 feet by 15 feet	$37,370
4. For dredging upper end of Long Island, 250 feet by 15 feet	37,150
5. For dredging lower end of Elba Island, 250 feet by 15½ feet	30,800
6. For dredging abreast Elba Island, 250 feet by 15½ feet	86,250
7. For dredging intermediate points, 250 feet by 15½ feet	5,000
8. For dredging upper end of Elba Island, 250 feet by 15½ feet	11,250
9. For dredging at "Wrecks" and vicinity, 250 feet by 15½ feet	15,000
10. For enlarging water-way at Fig Island	18,500
11. For dredging at Garden Bank	120,000
12. For new bulk-head just above Kinsey's mills	5,000
	481,320

* * * * * * *

Appropriation asked for fiscal year ending June 30, 1875, $100,000

In the annual report, &c., of October 20, 1874, after referring (p. 8) to the *project* of the preceding year, and its estimated cost of $481,320, General Gillmore proceeds as follows, (p. 10:)

An essential feature of that project is a dam at "Cross-Tides," with a sluice-way for river-boats, or in lieu thereof a deflecting jetty, the object in either case being to force into Front River, along the wharves of the city of Savannah, a portion of the large volume of water which now passes into Back River through the Cross-Tides, four miles above the city, and joins the Savannah River again below Fig Island, and one mile below the lower city limits.

Nearly two-thirds of the water coming down the Savannah River flows through the "Cross-Tides" into Back River, while only one-third of it passes down Front River past the city wharves and over the shoals known as Garden Bank and "The Wrecks," that are such serious obstructions to navigation.

I entertain grave doubts of the stability of any channel established over these shoals by dredging alone, unaided by suitable works for augmenting the volume of flow.

I therefore deem the construction of the work projected at "Cross-Tides," either a deflecting jetty or a sluice-dam—preferably the latter—as of capital importance.

In order to secure the construction of this work, and at the same time carry on the necessary improvement by dredging at points lower down, a liberal appropriation is recommended.

It is not improbable that after the jetty or dam is finished, it will be found necessary to contract the natural water-way at some points in order to establish a more rapid current over the shoals.

In my judgment the work at "Cross-Tides" should first be constructed. This will result in an increased volume of water to deal with at the shoals below. The measure of this increase will determine the method of improvement likely to prove the most advantageous.

The omission of this dam from the scheme of proposed improvement will, in my opinion, materially enhance the total cost of the projected works; for not only will the scouring effects of the increased flow to be established by the dam be wanting, but, to compensate for its absence, the contraction of the channel with longitudinal jetties in order to create an ebb current of the requisite velocity to keep the channel open, may have to be resorted to on a scale not estimated for or deemed necessary on the hypothesis of a dam at "Cross-Tides."

Even the postponement of the construction of this deflection jetty or dam until the heaviest part of the dredging is done on the shoals at and below the city will increase the cost of completing the works.

Its construction at the earliest practicable moment is urged as a measure of economy.

The detailed estimate of the total cost of the proposed improvements, together with a table of statistics showing the steady increase of the commerce of the city of Savannah, was included in my last annual report.

Financial statement.

Balance in Treasury of United States July 1, 1873.....	$70,000 00
Amount in hands of officer and subject to his check...	1,805 64
Amount appropriated by act approved June 23, 1874..	50,000 00
Amount expended during fiscal year ending June 30, 1874	71,149 55
Amount available July 1, 1874.....	50,656 09
Amount required for fiscal year ending June 30, 1876..	175,000 00
Additional amount which will be required to complete the project.....	256,320 00

Corresponding with these reports is the following legislation:

Act of June 23, 1874, chapter 457: "That the following sums of money be, and are hereby, appropriated to be paid out of any money in the Treasury not otherwise appropriated, *to be expended under the direction of the Secretary of War,* for the repair, preservation, and completion of the following public works hereinafter named."

Act of June 23, 1874, chapter 457: "For continuing the improvement of the harbor at Savannah, $50,000." (18 Stat., 240.)

Act of March 3, 1875, chapter 134: "For the improvement of the harbor at Savannah, Ga., $70,000." (18 Stat., 459.)

There were similar appropriations in 1872 and 1873, (17 Stat., 373 and 563;) and since this case has been pending the provision has been repeated, by the act of 1876, chapter 367, appropriating $62,000. (19 Stat., 134.)

This injunction therefore cannot be sustained without denying to the United States the right to say which of the various channels of a river bearing inter-State commerce shall be its navigable channel—a proposition which seems to contradict many solemn and often-quoted decisions of this court.

I conclude—

1. That the right of citizens of South Carolina to navigate the Savannah does not depend upon the agreement of 1788, which *so far* was annulled by the circumstance that the rights of both parties thereto have *so far* been merged in a common representative of both. The case against the continued existence of the *agreement* is stronger than that against the ordinance of 1787, in Strader *vs.* Graham, 10 How., 82.

2. That the right to navigation, &c., of such citizens is *perfect* under the Constitution of the United States,

and cannot be vindicated by a suit in the name of the State.

3. That the State has in the present case set forth no rights that justify its contention.

4. That, considering the action taken by Congress, it cannot be made to appear to judicial sight that there has been any *obstruction* of the navigation of the Savannah. All that has been done appears in such sight done in *improvement* of that navigation, and therefore in advancement of the rights of all citizens of the United States.

S. F. PHILLIPS,
Solicitor-General.

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